Supreme Court, U. S.
FILED
APR 29 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1588

SAMUEL C. WATHEN, JR.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner respectfully petitions that a Writ of Certiorari issue to the United States Court of Claims to review the judgment of that Court entered December 17, 1975, and its Order entered January 30, 1976, denying a rehearing *en banc* and rehearing to reconsider said decision.

OPINIONS BELOW

The Opinion and Findings of Fact of the Trial Judge of the Court of Claims as filed on November 11, 1974 is printed in Appendix A, *infra.* The Opinion on the case by the 3-Judge Panel of the Court of Claims was a Memorandum Opinion which will be reported in 208 Ct. Cl. ___, 527 F. 2d 1191 (1976) and printed in Appendix B, *infra.* The Order denying a rehearing of said Opinion is printed in Appendix C, *infra.*

JURISDICTION

The Order of the Court of Claims was entered on January 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1) and the Rules of the Supreme Court of the United States Rule 19(1)(b) and 2.

QUESTIONS PRESENTED

1. Did the Court of Claims err with respect to the question of its proper scope of judicial review as enunciated in opinions of this and other courts?

2. Must "the employer agency" enunciate at the time of discharge of a Preference Eligible employee the basis for its conclusion that the adverse action "will promote the efficiency of the service"?

STATUTES AND REGULATIONS INVOLVED

Veterans Preference Act of 1944, 5 U.S.C., Sections 3315, 7512 and 7701.

Back Pay Act of 1966, 5 U.S.C., Section 5596 (80 Stat. 94).

Federal Personnel Manual, Chapter 306, Sub-Chapter 5-2 (1969).

The Lloyd-LaFollette Act, 5 U.S.C., Section 652 (1964).

Rules of Conduct for Internal Revenue Service Employees, Foreword and Section 1941.4 (Revised October 1963).

The Administrative Procedure Act, 5 U.S.C., Section 706 (1970).

5 C.F.R., Section 735.209 (1975) (disgraceful conduct).

STATEMENT OF THE CASE

This case involves the suspension, removal, and refusal of reemployment and back pay of a former Internal Revenue agent entitled to Veteran's Preference on the ground that he had conducted himself in a manner which brought discredit upon the Internal Revenue Service (IRS) by fatally shooting a woman.

The opinions of the Trial Judge and the Panel of the Court of Claims, which appear at Appendices A and B herein, set forth a chronological history of the facts leading up to this Petition. In essence those facts are as follows:

On Sunday afternoon, May 9, 1965, the Petitioner was driving a woman, whom he intended to marry, on the capital Beltway in Silver Spring, Maryland. During said drive the Petitioner shot and killed the woman with a gun she carried in her purse, which the Petitioner had given her previously for her protection (R-4a).[1]

Petitioner was arrested on the scene by the police and held without bond at the Montgomery County jail in Rockville, Maryland (R-4a).

On May 11, 1965, the IRS advised the Petitioner of proposed suspension from employment (R-4a). On May 14, 1965, the IRS suspended the Petitioner from employment without pay, effective May 18, 1965, and further

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[1] "R" refers to the pages of the Trial Judge's Opinion and Findings of Fact filed on November 11, 1974, printed in Appendix A, herein.

notified him of the proposal to remove him from employment. The notification stated in pertinent part as follows:

> It is proposed, *in order to promote the efficiency of the Internal Revenue Service,* to remove you from the Service, *** on the basis of the following charge (emphasis added):
>
> Charge: Violation of Section 1941.4 of the "Rules of Conduct for Internal Revenue Service Employees" (Section 1941. 4 states, in part: "The effectiveness of the Revenue Service in serving the public interest depends upon the extent to which the Service and its [sic] employees hold the confidence and esteem of the Nation's citizens. *** –; by conducting himself during and outside working hours in a manner which will bring credit upon the Service; ***
>
> Specification: On Sunday, May 9, 1965, you conducted yourself in a manner which brought *discredit* upon the Internal Revenue Service by fatally shooting Miss Winifred O. McLaughlin. (R-35a).

On June 4, 1965, the IRS notified the Petitioner of his removal which became effective June 18, 1965. The record disclosed that IRS had no "evidence of record" to support this action other than an investigation report reciting the arrest and possibly some newspaper reports (R-6a).

At his arraignment on June 23, 1965 Petitioner plead not guilty, and he was found at his trial on December 8, 1965, to be not guilty by reason of insanity (R-6-7a).

Petitioner was remanded to Springfield State Hospital from December 8, 1965, until March 29, 1966, when a jury found him to be sane and he was released from custody to resume his civilian life (R. 7-8a).

Eight days after his release on April 6, 1966, the Petitioner presented himself on duty at the IRS, but was advised that consideration of his restoration would have to be made by written appeal (R-8a).

On May 17, 1966, Petitioner filed his written appeal with IRS seeking restoration to his job, which was denied on June 2, 1966 (R-8a).

Between the dates of June 13, 1966, and May 22, 1969, the Petitioner pursued his cause unsuccessfully with the Civil Service Commission (R-43-48a). Petitioner then filed a petition in the United States Court of Claims on May 22, 1969.

On June 2, 1972 the Court of Claims, sitting *en banc,* directed a Court of Claims Trial Judge to conduct proceedings to determine the Petitioner's "***ability to perform his duties as an Internal Revenue Agent, both at the time of the homicide and since***." The court further stated that "***no decision should be rendered by the court on the legality of the discharge until a full and adequate record is available on plaintiff's ability to perform his duties at all relevant times." (R-2a).

Pursuant to said order the Court of Claims Trial Judge (Judge Miller) concluded in a decision entered November 11, 1974, that the Petitioner was "entitled to judgment restoring him to his position in the Internal Revenue Service

and that [Petitioner] is entitled to recover back pay from April 6, 1966, the date when he became available for duty and applied for reinstatement, until the date of his restoration to duty" (R-55a).[2]

The Government appealed the Trial Judge's opinion, and on December 17, 1975, a three judge panel of the Court of Claims (See Appendix B) reversed his conclusions of law and ordered the petition dismissed.

Petitioner then filed a motion for rehearing *en banc* and for reconsideration with the Court of Claims, which motion was denied on January 30, 1976 (Appendix C). It is from this final denial and the opinion of December 17, 1975 that the Petitioner is hereby filing this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

This case involves "questions of exceptional importance"[3] which go to the very heart of the Court of Claims jurisdiction and the standard of review to be applied by the Courts in *all* Civil Service employee adverse actions. The divided opinion below establishes an erroneous doctrine of judicial review, which has been rejected by this Court, is in conflict with the rationale developed by United States Circuit Courts of Appeal, and has been overruled by the more modern decisions of the Court of Claims itself. If allowed to stand, it will result in the denial to Veterans Preference eligible federal servants of a fundamental statutory guarantee.

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[2] The Opinion and Findings of the Trial Judge are set forth in Appendix A.

[3] See page 78a footnote 3 of Appendix B (Opinion of December 17, 1975).

A. The Erroneous Court of Claims Decision

The Court of Claims decision of December 17, 1975, from which this Writ is sought is contrary to the holdings in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 42 L. Ed.2d 447, 95 S. Ct. 438, 419 U.S. 281 (1974) and *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969). The panel majority has applied an improper and unduly restrictive, scope of review standard in deciding this Petitioner's case.

In his dissenting opinion, Senior Judge Laramore of the Court of Claims pointed out that the majority of the Court's panel applied the wrong scope of review test when he stated as follows: (Page 75a, Appendix B, *infra*)

> "The Supreme Court of the United States in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra*, 419 U.S. 281, 285 (1974), has recently laid down the rule that, as a reviewing court, we must determine the legal framework within which administrative discretion is exercised:
>
> Under the "arbitrary and capricious" standard the scope of review is a narrow one. A reviewing court must "*consider whether the decision was based on a consideration of the relevant factors* and whether there has been a clear error of judgment***. Although this *inquiry into the facts is to be searching and careful,* the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe, supra* at 416. *The agency must articulate a "rational connection between the facts found and the choice made. Burligton Truck Lines v. United States,* 371 U.S. 156, 168 (1962)***. [Emphasis supplied]

Bowman states what I believe in this case to be the proper scope of our responsibility of review."

Judge Laramore also directed the majority's attention to *Norton v. Macy, supra,* wherein the reviewing court properly examined the record to ascertain whether there was any connection between the evidence against an employee removed from employment and the efficiency of the service. With respect to the issue of scope of review, Chief Judge Bazelon speaking for the Circuit Court, in the *Norton* case, articulated as follows (417 F.2d 1161, 1164):

"***we have recognized that, besides complying with statutory procedural requirements, the employer agency must demonstrate some *'rational basis'* for its conclusion that a discharge 'will promote the efficiency of the service" (emphasis added)

The Trial Judge in this Petitioner's case found "that there was no substantial evidence to support the determination of the IRS and Civil Service Commission that plaintiff was morally responsible for his conduct in connection with the homicide" (R-24a).[4] And concluded that in the basis of the record in the case, "there is no substantial evidence and the Civil Service Commission could not properly find that cause exists for "petitioner's discharge or the failure to reinstate him" (R-28a).

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[4] The Court of Claims has regularly subscribed to the application of the substantial evidence test in employee discharge review proceedings. *Jacobowitz v. United States,* 191 Ct. Cl. 444, 424 F.2d 555 (1970); *Haynes v. United States,* 190 Ct. Cl. 9, 418 F.2d 1380 (1969); *Camero v. United States,* 170 Ct. Cl. 490, 345 F.2d 798 (1965).

But despite the well reasoned logic of the Trial Judge's opinion, the majority of the Appellate Panel in this Petitioner's case felt that the Court of Claims had *no role* to play in determining whether or not there was a *sufficient nexus* between Petitioner's removal and the efficiency of the service, and therefore refused to examine the merits of Petitioner's removal action.

The Panel majority erroneously rejected the time honored rationale of nexus expressed by the Trial Judge to apply its own scope of review for this case as follows (Page 65a, Appendix B, *infra*):

"***the proper and historic scope of our consideration is to test whether such determinations are in *good faith* and supported by substantial evidence, or whether void because arbitrary, capricious, malicious or in bad faith, in excess of legal authority or in violation of statutes and regulations. Plaintiff must overcome the presumption of good faith on the part of the administrative officers.*** Accordingly, *we do not decide whether this legally faultless killing amounts to such cause for removal as will promote the efficiency of the service.* That is not our function." (emphasis added)

This Panel majority then went on to determine that the IRS and Civil Service Commission had acted in good faith and that their actions were not arbitrary, capricious, malicious or in bad faith.

Had the Panel majority of the Court applied the proper scope of review, as did Judge Laramore, and the Trial Judge below, it undoubtedly would have concluded that there was no *rational connection* or *sufficient nexus* between the removal, and refusal of reemployment and

Petitioner's non-volitional and unconscious conduct which was without legal fault.

As noted in the dissenting opinion of Judge Laramore, the majority opinion was founded in emotionalism rather than sound reasoning because of the bizarre facts of the case. Such a precedent is detrimental not only to the Petitioner, who has functioned normally since the unfortunate event, but to each and every Civil Service employee who seeks review of agency action by the Court of Claims. The ruling is clearly not within the guidelines established by this court in *Bowman, supra,* the United States Court of Appeals in *Norton (supra),* and other opinions decided by the Court of Claims.

The majority opinion appears even more peculiar when one considers that in 1972 the Court of Claims, *en banc,* ordered the Trial Judge to determine the ability of the Petitioner to perform his duties. Yet once having established the fact that Petitioner was capable of performing his duties without harm to the IRS or others, the majority nonetheless saw fit to overrule their own Trial Judge's conclusions.

At the trial, the testimony developed that the Petitioner was not a menace to the safety of persons or property of other people and there was no evidence of any mental disease which would interfere with Petitioner's gainful employment (R-16a). There was never any challenge that Petitioner was anything but a satisfactory employee, and fully qualified to continue in his previous employment.

The Trial Judge, in his opinion, reasoned as follows:

"Both the IRS and the Civil Service Commission accept the view that mental illness is not a cause for removal or denial of reinstatement if the employee has recovered. The Civil Service Commission policy, set forth in FEDERAL PERSONNEL MANUAL, Chapter 306, 5-2 (1969), is that, 'As a general rule, a history of mental illness is not disqualifying for Federal employment provided that recovery has been certified by competent medical authority and the applicant is capable of performing the duties of the position without hazard to themselves or others ***.' Thus sub-chapter 5-2 provides both for initial employment and for reinstatement if the employee has previously been dismissed for reasons attributable to mental illness. *See also, Manzi v. United States,* 198 Ct. Cl. 489, 493 (1972)."

"The charge herein upon which Petitioner's dismissal was based was a disciplinary one. He had violated Section 1941.4 of the U.S. TREASURY DEPARTMENT RULE OF CONDUCT FOR INTERNAL REVENUE SERVICE EMPLOYEES (Rev. 10-63) by conducting himself in a manner which brought discredit upon the IRS. It would be odd if cured mental illness is not disqualifying for Federal employment, yet the employee may still be subject to disciplinary dismissal for his conduct which resulted from the illness. It is not reasonable to construe the Rules to threaten sanctions for anything less than *volitional or conscious behavior. Cf. Morissette v. United States,* 342 U.S. 246 (1952).

> "Good public relations is a desideratum of every employer Government agency. Since even if it does not deal directly with the public at least it depends on the public's goodwill for its appropriations. But it is difficult to believe that in enacting the Veterans' Preference Act of 1944, Congress intended to permit an agency to achieve the purpose of acquiring or maintaining a good public image at the price of dismissing veterans as disciplinary measures for conduct for which they may have been wholly without fault." (R-26-27a)

The record below fully supports this reasoning. The panel's determination to reverse is not in accord with either the facts or the law. Review by this Court must follow.

B. The Conflict With Circuit Courts and Other Court of Claims Opinions

In refusing to look into and articulate a nexus between Petitioner's removal and the efficiency of the service the opinion below is clearly in conflict with the views of other federal courts and other decisions of the Court of Claims.

Title 5 U.S.C., Section 7512, the Veterans' Preference Act of 1944, was designed to confer a measure of job security on veterans. Insofar as Congress provided therein that an employee having such status may be dismissed "only for such cause as will promote the efficiency of the service." *Norton v. Macy, supra.* Accord: *Mindel v. United States,* 312 F. Supp. 485, 487 (N.D. Cal. 1970). Although the Court of Claims has distinguished the result in the *Norton* case, its reasoning has also assumed the need for a showing of a rational basis. *Schlegel v. United States,* 189 Ct. Cl. 30, 416 F.2d 1372 (1969), *cert. denied,* 397 U.S. 1039 (1970). And see also: *Jacobowitz v. United States,* 191 Ct. Cl. 444, 459, 424 F.2d 555, 563 (1970).

The panel majority cited with approval *Golding v. United States,* 78 Ct. Cl. 682, *cert. denied,* 292 U.S. 643 (1934) for the proposition that the Court of Claims had *no* jurisdiction whatsoever to inquire into the sufficiency of cause for removal to promote the efficiency of the service. *Golding* was decided on demurrer in 1934. That case, was decided before the Veterans Preference Act, the Back Pay Act of 1966, and the Administrative Procedure Act of 1946 were enacted. It no longer represents the proper scope of review standard. The language of *Golding* must also be contrasted with the Courts own decision in *Gadsden v. United States,* 119 Ct. Cl. 86, 100 F. Supp. 455, *cert. denied,* 342 U.S. 656 (1951).

Recent decisions make clear that the "Courts now have a responsibility to review even discretionary administrative action", (Page 74a, Appendix B, *infra*). The Agency is now obligated to articulate a rationale in removal proceedings (*Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra.)* Courts cannot permit an agency to stand mute while removing a civil servant from the rolls. The property right of the employee in his position is too great. *Arnett v. Kennedy,* 416 U.S. 134, 40 L.Ed.2d 15, 94 S. Ct. 1633 (1974).

It is now well-settled by judicial precedent that in judicially reviewing an adverse action against a public servant to determine whether constitutional rights have been enfringed, Courts uniformly look to the merits of the case in detail. *Keyishian v. Board of Regents,* 385 U.S. 589 (1966); *Garrity v. State of New Jersey,* 385 U.S. 493 (1967); *Slochower v. Board of Education,* 350 U.S. 551 (1956); *Wieman v. Updegraff,* 344 U.S. 183 (1952); *Powell v. Zuckert,* 366 F.2d 634 (D.C. Cir. 1966).

To hold otherwise would be to equip the agency with an arbitrary chute for use in sliding Preference Eligible Civil Servants past the safeguards of articulated reasoning and appropriate review thereof out onto the streets of the unemployed. Such process opens the gates of abuse and destroys that which Congress guaranteed when it gave Veterans the 1944 legislation.

Throughout its present era, the Court of Claims in both, its Trial and Appellate divisions, has undertaken to review the record below to ascertain whether a separation was "for a cause which served to promote the efficiency of the service". *Gordon v. United States,* 204 Ct. Cl. 905, 906 (1974). Other Courts have done the same.

There is ample support for the concept of complete review in other decisions. The case of *Charlton v. United States,* 412 F.2d 390, (3rd Cir., 1969) involved a dismissal action against an IRS investigator. The opinion there concisely states the effect of the Administrative Procedure Act upon the scope of judicial review and states:

> "(APA), Section 706 spells out the scope of judicial review of a federal agency's action in clear and precise terms and it is controlling and dispositive. It supersedes and makes irrelevant judicially fashioned concepts of the scope of judicial review of a federal agency's action, declared both prior and subsequent to its enactment."

And so the rationale of mandatory Court review of the *entire* record has developed.

The *Charlton* opinion goes on to cite a series of cases for the proposition that "courts after determining whether procedural requirements have been met must further determine, upon review of the entire administrative record, whether substantial evidence supports the federal agency's

action in disciplining a federal employee". 412 F.2d at 394.

Where the entire record of evidence before the Reviewing Court does not support the administrative conclusion, then the agency determination cannot stand. *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, 487 (1951).

In the case of *Ciambelli v. United States,* 198 Ct. Cl. 240 (1972), which is far more up to date than *Golding,* the Court of Claims examined the nature of the evidence used in support of a removal proceeding of a Veteran and found the dismissal wrongful on the basis that it *was not supported by substantial evidence.*

Within the past decade, in *Louks v. United States,* 184 Ct. Cl. 361, 370, 395 F.2d 993, 997 (1968), *Kowal v. United States,* 188 Ct. Cl. 631, 638, 643, 412 F.2d 867, 870, 873 (1969), *Urbina v. United States,* 180 Ct. Cl. 194, 208 (1967), among others, the Court of Claims also examined the sufficiency of evidence used to support dismissal actions for the good of the service. It found in each such case that since the removal proceedings were unsupported by *substantial evidence,* the actions of the agencies were arbitrary and could not stand.

And in those cases where the agency has initially contended the separation promoted efficiency and where the Civil Service Commission has concurred, still the Court of Claims has elected to scrutinize with care and to review the entire record, when the issue of arbitrary and capricious agency action has been appropriately raised. *Clark v. United States,* 162 Ct. Cl. 477 (1963); *Scott v. United States,* 160 Ct. Cl. 152 (1963); *Smith v. United States,* 151 Ct. Cl. 205 (1960); *Crocker v. United States,* 130 Ct. Cl. 567 (1955); *Knotts v. United States,* 128 Ct. Cl. 489, 121 F. Supp. 630 (1954).

The same rationale for Court review has prevailed in the area of military pay and discharge cases as was recently shown in *Yee v. United States*, 206 Ct. Cl. 388 (1975), decided March 19, 1975. It is clear that the outdated *Golding* rationale has been eroded by subsequent decisions of the Court of Claims such as *Levy v. United States*, 118 Ct. Cl. 106, 111 (1950) and *Gadsden v. United States*, *supra*, which set forth the modern concept of the scope of judicial review over administrative actions. The view of the panel majority is contrary to the updated standard of this Court.

As Senior Judge Laramore's dissent points out (Pages 73-74a, Appendix B, *infra*), the panel majority incorrectly states the Court of Claim's position in *Schlegel v. United States*, 189 Ct. Cl. 30, 416 F.2d 1372 (1969), cert. denied, 397 U.S. 1039 (1970). *Schlegel* had for consideration a removal based upon homosexual acts on four different occasions. There the Court of Claims specifically approved the determination of the Agency saying that "If activities of this kind are allowed to be practiced in a government department, it is inevitable that the efficiency of the service will in time be adversely affected." (189 Ct. Cl. at 41). But there is no language in *Schlegel*, as the majority suggested, which expresses disapproval of the standard of review set forth in the oft-cited opinion *Norton v. Macy*, *supra*. In fact, the Court of Claims in *Schlegel* made a specific determination that the testimony constituted convincing proof that Schlegel's removal promoted the efficiency of the service. Thus the court sought for and found a *sufficient nexus* between the removal and the efficiency of the service. Despite this fact the Court of Claims refused to make a similar search in Petitioner's case. It refused to adhere to its own well established standards which post date the antiquated *Golding* approach.

Perhaps the refusal to make the search lay in the fact that the Petitioner had taken the life of another, a fact which shocked the sensibilities of the Court. The worn Maxim that "Hard cases make Bad Law" rings as true in this case as any other and by refusing to make the search for a *sufficient nexus*, the Court of Claims established an unfortunate precedent. This Precedent is in conflict with the accepted jurisdictional standards of review in adverse civil service actions.

Norton articulated the view, which the Court of Claims followed in *Ciambelli*, *supra* and used as a threat in other cases cited *supra*, that the Courts have a *responsibility* in determining whether a sufficient nexus exists between the removal action under review and the efficiency of the service.

Other federal courts have adopted a similar approach. In *Mindel v. United States Civil Service Commission*, 312 F. Supp. 485, 487 (N.D. Cal., 1970), it was said:

> "Even if (employee's) conduct can be characterized as immoral, he cannot constitutionally be terminated from government service on this ground. Absent a *rational nexus* between this conduct and his duties as a postal clerk ***
>
> The government's argument that the regulations do not require a showing of rational nexus is unconvincing, as such a reading would render them constitutionally suspect on due process grounds."

In this regard, see also: *Scanland v. United States Army Test and Evaluation Command*, 389 F. Supp. 65, 77 (U.S.-D.C., D. Maryland, 1975) (a civilian dismissal action).

While acknowledging the importance of substantial administrative discretion, the Supreme Court has also circumscribed its use. The standard for agency action *now demands* the *articulation* of a "rational connection between the facts found and the choice made". *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra; Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962). For as this Court recognized in *Burlington Truck Lines,* 371 U.S. at 169:

> "Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion."

The panel majority of the Court of Claims below then is in serious conflict with previous determinations by this and other federal courts on the critical question of the scope of judicial review of agency action, which goes to the very heart of each and every adverse action review.

In effect, the panel majority says that the Court of Claims cannot review agency determinations as to what constitutes the "good of the service", even though said decisions may be arbitrary and capricious, grossly erroneous, or unsupported by substantial evidence. Such an erroneous conclusion, if permitted to stand, would destroy the time honored scope of review process by the Court, and would reverse the many previous decisions by the Court of Claims as cited above, and would establish a totally different and unconscionably restrictive roadblock to review, which is contrary to all the well established principles of jurisprudence and to well reasoned guidelines.

C. The Necessity for an Articulated Connecting Link

The majority opinion relies heavily upon *Gueory v. Hampton,* 510 F.2d 1222 (D.C. Cir., 1974) to support the agency's presumption of a nexus between Petitioner's conduct and jeopardy to the efficiency of the service. However, the language in *Gueory* is readily distinguishable from Petitioner's case.

Each and every case involving criminal conduct cited in *Gueory* (510 F.2d at 1222) involved *volitional and conscious behavior.* Here Petitioner's lack of intent and mental incapacity to violate IRS regulations or standards negates the nexus and overcomes any presumptions.

Chief Judge Bazelon's opinion, on appellee's suggestion for rehearing *en banc,* in the *Gueory* case (510 F.2d 1127-1232), properly explains why agency reasons for a determination on efficiency must be announced, sufficient, and exacting in nature to suggest a "connection" between the actions complained of and service efficiency.

The cases relied upon in this case by the panel majority below for the proposition that public image considerations are sufficient justification for discharging an employee who is without fault, are also inapposite to the facts at hand. In *Hoover v. United States,* 206 Ct. Cl. 640, 513 F.2d 603 (1975) an IRS tax technician was charged with claiming income tax deductions to which he was not entitled – an offense which went to the very heart of the abuses which he, as a tax official, was charged with preventing.

Birnholz v. United States, 199 Ct. Cl. 532, 537 (1972) also involved removal of an IRS agent for work-related activities reflecting adversely on the integrity of the service. The employee was dismissed for falsifying time work sheets and travel vouchers, failure to work the required hours

and failure to follow his supervisor's instructions. In approving the dismissal the Court of Claims said (199 Ct. Cl. at 557):

> "The IRS is rightly concerned with its image of honesty and integrity. Members of the public, who must turn square corners in tax matters, demand no less of revenue officials. Section 1942.55 of Rules of Conduct makes this clear and provides a stern warning of severe disciplinary action and prosecution for failure to be truthful in all matters of official interest, including work reports of any nature, and vouchers."

In like fashion, the removal of an employee for violation of specific mandates or exercise of bad judgment by IRS officials have been upheld as promoting the efficiency of the service. *Korman v. United States,* 199 Ct. Cl. 78, 84, 462 F.2d 1382 (1972).

In contrast, this Petitioner was never charged with an offense involving his duties as an IRS agent and was at the time of his application for reinstatement *fully able to perform the duties of his position.*

The panel majority resorted to the same type of legally naive reasoning, which was used in the administrative proceedings by both IRS and the Civil Service Commission employed in attempting to attack as tainted the Montgomery County Court's judicial determination that Petitioner was not responsible for the crime for which he was indicted (Page 69a, Appendix B, *infra*). To describe as "curious" the Montgomery County Circuit Court's determination of insanity is to evidence an erroneous grasp of criminal procedure. Just as Petitioner lacked the mental capacity for conviction, so he lacked the capacity to *knowingly* violate IRS regulations.

The carefully expressed opinion of the Trial Judge (Appendix A, *infra*) properly enunciated the complete lack of rational basis for the final administrative action taken against this Petitioner.

The majority stated its belief that the evidence of record on June 4, 1965, was substantial evidence to support a finding that the Petitioner's actions brought discredit on the IRS (Page 66a, Appendix B, *infra*). It then referred to certain newspaper clippings relative to the homicide which were *not* even in the record at the time of separation, in June 4, 1965 and could not therefore have been used to support the separation. As the Trial Judge noted in his Opinion, it was only *after the administrative report was closed,* that the government appended these newspaper clippings to its brief submitted to the Appeals Examining Office of the Civil Service Commission (R-24a). There was no evidence whatsoever that the clippings were relied upon when the June 4, 1965, removal decision was made. The sole document of record, *at that time* was the sketchy investigative report of May 11, 1965 (R-18a).

It is the legal merits of the April 4, 1968, decision of the Appeals Examining Office, affirmed by the Appeals Board by letter of June 28, 1968, which are relevant and are insufficient to support the government's action. The trial below, as ordered by the Full Court in 1972, conclusively showed this insufficiency.

The role of the Court of Claims in examining the nexus between the action and the efficiency of the service is well established and if the link is present *it must be articulated.* In Petitioner's instance, a trial has shown an insufficient nexus to exist because of the block of mental illness at the time of conduct. This is just what the Full Court in 1972 had ordered the Trial Judge to ascertain. The speculative conclusions by the majority panel, as to what the

agency or the Civil Service Commission *might have* considered or rationalized in 1965 or 1968, do not overcome the soundness of the dissenting opinion and the conclusions of the Trial Judge. Conjecture cannot substitute for the announced reasoning required to set forth the link between action and service efficiency.

Agencies cannot mouth the conclusion "for the good of the service" and refuse to enunciate the rationale or basis for such conclusion under our modern concept of proper removal procedure. If the two to one decision of the Court of Claims Panel below is allowed to stand, it will reverse the established procedure for adverse action by agencies. This must not be condoned. The protective guarantees of the Veterans Preference Act and the rights of all Civil servants cannot allow this to happen. The Veteran employee is entitled to an enunciated basis for the agency's conclusion.

This case must be evaluated on the basis of the prevailing application of judicial review and not on the basis of emotional appeal.

CONCLUSION

The outcome of this case is of importance to *each* and *every* federal Civil service employee who would have his agency action against him reviewed by the Court of Claims in his quest for back pay. To allow this decision to stand would be to foster a split of authority in the courts of this land in clear violation of previous decisions of this and other Courts. For these reasons it is believed that this Petition for Writ of Certiorari should be granted and that this Court should redress the Petitioner's wrongs by granting a full review which can only result in ordering his restitution to his former position and the payment to him

of all his back pay from April 6, 1966. Such a decision would delinate once and for all the proper scope of review to be utilized by the Court of Claims.

Respectfully submitted,

By _____

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APPENDIX A

IN THE
UNITED STATES COURT OF CLAIMS
TRIAL DIVISION

No. 249-69

SAMUEL C. WATHEN v. THE UNITED STATES

John I. Heise, Jr., attorney of record for plaintiff.

LeRoy Southmayd, Jr., with whom was *Assistant General Carla A. Hills*, for defendant.

[Filed November 11, 1974]

OPINION*

MILLER, *Trial Judge*: Plaintiff, a former revenue agent entitled to veteran's preference, was removed from his position on the ground that he had conducted himself in a manner which brought discredit upon the Internal Revenue Service (IRS) by fatally shooting a woman. After his removal, however, a Maryland court quashed a murder indictment against plaintiff because it found him to have

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*The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

been mentally ill at the time of the homicide and not responsible for his actions; and it ordered him confined to a State mental hospital until cured. Although he was subsequently released from the hospital upon a judicial determination that he was no longer mentally ill and not a threat to himself or to others, the IRS and the Civil Service Commission nevertheless refused to reinstate him, on the ground that the original reason for his removal was still correct. Plaintiff sues for back pay and restoration to duty.

After this case was brought in this court both parties moved for summary judgment on the basis of the administrative record. On June 2, 1972, the court denied both motions because it was of the view that—

> in the special and unusual circumstances of this case the *issue* of the *legality* of plaintiff's removal is so *connected* and intertwined *with* the issue of *his ability to perform* his duties as an internal revenue agent, both at the time of the homicide and since, that the two issues should be tried together in this court and no decision should be rendered by the court on the legality of the discharge until a full and adequate record is available on plaintiff's ability to perform his duties at all the relevant times.

The administrative record has now been supplemented by the record of a 3-day trial, and the facts set forth hereinafter have been drawn from both.

Plaintiff was first employed as a revenue agent in June 1951. After 10 years of satisfactory service in field offices in the Washington metropolitan area, in June 1961 plaintiff was promoted to the position of tax law specialist, grade

GS-12, in the National Office of the IRS, in the Office of the Assistant Commissioner (Technical), Tax Rulings Division, Corporation Tax Branch, Earnings and Profits Section. Plaintiff was one of ten revenue agents in such section whose function it was to analyze surplus accounts of corporations throughout the Nation to determine the extent to which corporate distributions were out of accumulated or current earnings and profits, and hence were to the stockholders dividends includable in ordinary income rather than returns of capital gains. Plaintiff obtained the necessary information from current and prior corporate income tax returns in the files of the IRS, from additional submissions by corporate accountants and attorneys and from revenue agents in the field. This entailed no field audits by plaintiff. Communications and dealings with corporate representatives occupied about 30 percent of plaintiff's time, but of this his personal meetings took no more than 10 percent, and at such conferences his section chief was invariably present. Plaintiff's performance and conduct in this position also earned him consistently satisfactory ratings.

In May 1965 there occurred the events which gave rise to plaintiff's removal. Plaintiff was approximately 41 years of age and had been married for a number of years. He had been separated from his wife for about 3 years with each having informal custody of two of their four children. Although he believed his wife would consent to a divorce, she had not yet made up her mind to do so. For the prior 16 months plaintiff had been living with a 28-year-old woman, Winifred O. McLaughlin, whom he intended to marry and move with to San Francisco as soon as it became feasible. In April 1965, in anticipation of this, he had initiated a request for transfer to the San Francisco Office

of the IRS. For reasons not clear from the record Miss McLaughlin apparently decided to leave for San Francisco alone on Sunday, May 9, 1965. Plaintiff drove her in the direction of the Baltimore airport, and while on the Capitol Beltway in Silver Spring, Maryland, for reasons and circumstances also not disclosed by the record, they had an altercation. They both left the car, and plaintiff shot and killed Miss McLaughlin with a gun which plaintiff had given her some time previously for her protection, and which she kept in her purse. Plaintiff stayed with her body and made no effort to flee He was arrested on the scene by Maryland Police, charged with murder and held without bond in the Montgomery County jail, at Rockville, Maryland.

On the next day, when the matter came to the attention of IRS, its Internal Security Division requested an IRS inspector to contact the Montgomery County Police. He reported on May 11, 1965, that plaintiff had been arrested on May 9, was charged with murder and was currently being held without bond.

On the day he received such report the Director of the Tax Rulings Division of IRS sent a notice to plaintiff at the Rockville jail that no later than 5 days thereafter he proposed to suspend plaintiff from duty without pay until the Service could investigate the allegations of his arrest and the murder charge made against him. Although he noted that plaintiff was being held without bail and was unavailable for duty in any event, he states that plaintiff's behavior, if substantitated, was so detrimental to the interest of the Service that plaintiff could not be kept in an active-duty status while the matter was being investigated and adjudicated. Plaintiff was given the right to reply both in

writing and in person, and to furnish affidavits and evidence showing cause why he should not be suspended. On May 14, 1965, the Director of the Tax Rulings Divisions notified plaintiff that since he had not replied to the suspension notice, upon consideration of the evidence of record, plaintiff would be suspended without pay, effective May 18, 1965. The only "evidence of record" in the file at that time was the investigator's report of May 11 and possibly the newspaper stories concerning the events.

On May 14, 1965, the Director of Tax Rulings Division also transmitted to plaintiff at the jail notice of his proposed removal after 30 days in order to promote the efficiency of the IRS. The proposed removal was based upon a violation of Section 1941.4 of the U.S. TREASURY DEPARTMENT RULES OF CONDUCT *for* INTERNAL REVENUE SERVICE *Employees* (Rev. 10-63). This section states that the effectiveness of the Revenue Service depends upon the extent to which the Service and its employees holds the confidence and esteem of the public; that each employee must conduct himself both during and outside working hours in a manner which will bring credit upon the Service; and that employees whose conduct does not conform to such rules may be removed from the Service or may be the subject of other disciplinary action. The specific charge was that, "On Sunday, May 9, 1965, you conducted yourself in a manner which brought discredit upon the Internal Revenue Service by fatally shooting Miss Winifred O. McLaughlin." He gave plaintiff the right to reply to the charge and to furnish affidavits and evidence.

Again, plaintiff did not respond. He furnished both notices to his attorney, and the latter (who had no

experience in Civil Service matters) made the judgment that he should concentrate exclusively on defense of the criminal charge and make no response to either the proposed suspension or removal until after plaintiff was cleared of such charge.

On June 4, 1965, the Director of the Tax Rulings Division notified plaintiff that in view of plaintiff's failure to reply, he had made a thorough review of the evidence of record and had found that the charge and specification were fully supported by the evidence and warranted plaintiff's removal. Accordingly, he had removed plaintiff from the Service, effective June 18, 1965. Again, in fact the only "evidence of record" the IRS then had and relied upon for this action was the investigative report of May 11, 1965, and possibly the newspaper stories.

A grand jury indicted plaintiff for murder on June 8, 1965. At his arraignment on June 23 plaintiff entered a plea of not guilty by reason of insanity. Whereupon the Montgomery County Circuit Court ordered plaintiff committed to the Clifton T. Perkins State Hospital at Jessup, Maryland, for examination and report. From July 30 to November 16, 1965, he was subjected to intensive study, including psychiatric examination and psychological tests. An investigation of his past environment and way of life was also conducted by a social worker. The hospital staff subsequently correlated the clinical evaluations with the police reports, the statements of witnesses, and the reports of plaintiff's contemporaneous behavior and words on the occasion of the homicide.

At the conclusion of these studies Dr. John M. Hamilton, superintendent of the State hospital, reported to the court

and to the prosecutor that at the time of the homicide plaintiff suffered from a mental illness. On the basis of such report the State moved to dismiss the murder indictment against plaintiff. On December 8, 1965, the Montgomery County Circuit Court held a trial at which the State called Dr. Hamilton as its witness. Dr. Hamilton testified that on the day in question plaintiff had apparently faced an insurmountable stress and emotional trauma. Unable to bear them at his normal level of consciousness, he had experienced a psychoneurotic dissociative reaction, or true amnesia, in which he lost both his awareness and his ability to carry on proper cogitative processes. As a result he then did not have the capacity or reason to distinguish right or wrong or to know the consequences of his acts, and he was not responsible for his actions. Dr. Hamilton further testified that at the time of trial plaintiff's illness did not make him a risk to others, but that he continued to suffer from psychoneurotic illness accompanied by depression so that he was likely to do injury to himself. He recommended that plaintiff receive intensive psychotherapy under the supervision of a psychiatrist, and expressed the opinion that with such treatment there was a good possibility plaintiff would return to his previous level of responsibility.

The court found plaintiff not guilty by reason of insanity because at the time the alleged crime was committed he did not know the difference between right and wrong, or the nature and consequences of his acts as they pertained to himself. It quashed the murder indictment; however, it did not accept Dr. Hamilton's conclusion that plaintiff was not a menace to other people, and it ordered plaintiff committed to the Springfield State Hospital until cured.

Plaintiff remained in that hospital from December 8, 1965, until March 29, 1966. Shortly before the latter date plaintiff applied to the Montgomery County Circuit Court for release, and on that day the court held a trial with the aid of a jury to determine plaintiff's sanity. The only witness was Dr. Heinz H. Klaatsch, the psychiatrist in charge of the Mental Division of the Springfield State Hospital. He testified that on the basis of the studies made by himself and the staff of the institution plaintiff was not then insane, was not a danger to himself, was not a menace to the safety of others, and had no mental disease; that the safety of persons and property in general would not be adversely affected by plaintiff's release from the hospital; and that plaintiff then knew the difference between right and wrong and understood the nature and significance of his actions. The court instructed the jury that a person is insane within the meaning of the law when he does not have the capacity and reason to distinguish right and wrong and understand the nature and consequences of his actions, or when by reason of mental illness he is reasonably likely to menance the safety of himself or the person or property of others. It placed the burden of proving his sanity by a fair preponderance of the evidence upon plaintiff. On March 29, 1966, the jury found plaintiff sane and the court released him.

On April 6, 1966, plaintiff presented himself for duty at the IRS but was denied reinstatement. His written appeal, filed May 17, 1966, was rejected on June 2, 1966, as being out of time, since his removal had been effective almost a year earlier. Plaintiff's appeals to the Civil Service Commission were likewise rejected as untimely by the Appeals Examining Office on August 10, 1966, and by the

Board of Appeals and Review on December 7, 1966. However, on May 24, 1967, the Civil Service Commissioners reversed the decisions below and determined that plaintiff's case should be reopened and adjudicated on the merits. They remanded the case to the Commission's own Appeals Examining Office for further development and a new adjudication.

The Internal Revenue Service remaining adamant with respect to his nonrestoration to duty, plaintiff then proposed to counsel for the IRS that the matter be submitted to the Civil Service Commission for adjudication on the merits by a stipulation of documents. This was done in September 1967. For reasons that are not explained by the parties, neither party made a full presentation in support of his position. Plaintiff did not offer the reports, nor the transcripts of the testimony of Drs. Hamilton and Klaatsch before the Montgomery County Circuit Court, but only photocopies of the docket entries in the criminal proceeding in which plaintiff was found not guilty by reason of insanity and in the civil proceeding in which plaintiff was subsequently found to be sane and released. With respect to plaintiff's mental condition, the pertinent docket entries in the criminal proceeding showed the following:

November 24, 1965	-	Defendant's plea of insanity filed.
* *		* * *
December 8, 1965	-	State confesses a plea of not guilty by reason of insanity filed.
December 8, 1965	-	The Court, Judge Moorman, finds Defendant not guilty by reason of insanity.

December 8, 1965 - Hearing before Judge Moorman, Miss Wissenbach reporting.

December 8, 1965 - The Court orders Defendant committed to Springfield State Hospital.

December 8, 1965 - Order of Court committing Defendant to Springfield State Hospital filed and copies issued.

IRS included no statements of witnesses nor investigatory reports in its documentary exhibits to establish the circumstances of plaintiff's misconduct, nor did it produce any evidence to prove that plaintiff had not been mentally ill and was in fact responsible for his conduct. It merely included in an appendix to its brief photocopies of five clippings from three Washington, D. C. newspapers containing stories of the homicide and plaintiff's arrest therefor.

In his brief to the Appeals Examining Office of the Commission plaintiff urged that his removal was based solely on the charge made by IRS that he had been arrested and indicted for the crime of murder, and that pursuant to the FEDERAL PERSONNEL MANUAL, SUPPLEMENT 752-1, ADVERSE ACTIONS BY AGENCIES, Section S3-2a(2) (1972) plaintiff's acquittal of the criminal charge required his reinstatement to duty. IRS in its brief conceded that plaintiff's suspension had been based on the filing of criminal charges against him but asserted that his removal had been based on his failure to deny that "he fatally shot Miss Winifred O. McLaughlin . . . [and] that in so doing he brought discredit upon his employer." It claimed that the newspaper stories without more constitute

substantial evidence to substantiate the charge. With respect to plaintiff's acquittal IRS stated that the circuit court's docket entries showed–

> that he was not acquitted by a jury but was in reality acquitted by the State's Attorney. While it is of no concern to the Internal Revenue Service how the State of Maryland administers its criminal laws, it would be of grave concern to the Service if a State's Attorney could, by his handling of a criminal case, deprive the Service of its right and duty to remove an employee whose conduct was patently offensive and discrediting to the Service.

IRS referred to no evidence that would tend to establish the action of the State's attorney or the Maryland court was improper or mistaken, or that plaintiff was acquitted by the State's attorney rather than by the court.

The opinion of the Appeals Examining Office of the Commission, dated April 4, 1968, sustained the removal action of IRS. The opinion gave short shrift to the insanity plea. It intimated that such defense was merely a device used by plaintiff to escape punishment in a criminal case, and that plaintiff's deed was inconsistent with the standards of conduct for the Federal Service regardless of his state of mind. It stated:

> The undisputed facts of this case are: On Sunday, May 9, 1965, the appellant discharged a gun into the body of Miss Winifred O. McLaughlin, from which wound she died. The shooting was not done in self defense and the act itself can be fairly described as the unlawful killing of a human being. The appellant was arrested and an indictment for murder was filed against him. He filed

a plea of not guilty by reason of insanity. *By virtue of this plea*, criminal prosecution was not taken against him. The record indicates the appellant was committed to the Springfield State Hospital.

On about March 29, 1966, the appellant was found sane and released from the hospital, according to the record on file. The removal action against the appellant is based upon the fact that he did kill a human being and *this act of killing violates standards of conduct required for retention on the rolls of the Internal Revenue Service.*

* * * * *

As noted hereinbefore, there is no allegation in the record that the killing of this human being was done pursuant to authority of law or in self defense. In no sense then can it be a justifiable homicide as attorney for the appellant states. The situation requires no long discussion. *The fact of the matter is that an Internal Revenue Agent has killed a human being, and has only escaped punishment by virtue of a plea of insanity. It is a simple conclusion of fact that the unjustified killing of a human being is inconsistent with the standards of conduct for employees in the Federal Service regardless of the state of their mind at the time the killing was committed.* Therefore, we find the appellant's removal was for a cause which promotes the efficiency of the service [underscoring supplied].

* * * * *

On plaintiff's appeal to the Board of Appeals and Review of the Commission the Board affirmed the Appeals Examining Office; in its opinion it discussed only the

issue of whether plaintiff had been charged with having committed a crime or with the act of killing a human being; and correctly concluded it was the latter. It made no mention whatsoever of the merits of the insanity issue, judgment or defense. In its brief to the Board the IRS representative again misstated that "appellant was never tried; it was the prosecutor–not the court–which found appellant 'not guilty by reason of insanity'." On December 9, 1968, without opinion, the Commissioners declined to reverse the decision of the Board of Appeals.

At the trial in this court Dr. John M. Hamilton, who had testified on behalf of the State in the criminal proceedings in the Maryland court, reaffirmed the substance of his prior testimony that plaintiff had experienced a mental illness shortly prior to and at the time of the homicide, that as a result of such illness he was not responsible for his actions at the time, and that he did not have the capacity or reason to distinguish right or wrong or to know the nature or consequences of his acts. He explained that dissociative episodes occur most commonly to an individual with a personality of a kind which is unable to bear the impact of a particular form of emotional trauma. Feelings and reactions build up which are so assaultive upon him as to be extremely destructive if he has to encounter them at the level of consciousness or awareness at which most of us usually operate; therefore, a different level of consciousness occurs to keep this traumatic effect from bringing itself to bear on the individual's aware personality.

He also reaffirmed the opinion that plaintiff did not and does not represent a threat to the safety of others. He conceded that since the basic components of an

individual's personality are difficult to change there is always the possibility that plaintiff may suffer another dissociative episode or loss of awareness, if he has to face new stress or trauma of similar kind or magnitude which attacks him again in the area of his vulnerability. But even if plaintiff should again incur a dissociative reaction, Dr. Hamilton was of the opinion that the probability of it being accompanied by an act of violence such as occurred in 1965 is statistically minute, on the order of 1 in 10,000. He testified that in the nature of this illness once any kind of catastrophic or heinous incident involving violence of a destructive nature occurs there is seldom a recurrence. Moreover, for such an act of violence to recur, the constellation of events (including the victim having a gun) which makes it possible for a horrendous or catastrophic event to occur within the contest of the dissociation would also have to occur so as to place the individual in a threatening position. Dr. Hamilton also stated that he was reinforced in his opinion that plaintiff did not represent a threat to the safety of others by the fact that during the intervening 8 years plaintiff had not suffered any amnesic occurrences or other manifestations of similar illness.

Defendant did not seriously challenge Dr. Hamilton's opinions by way of cross examination and it offered no testimony to the contrary.

At the trial Dr. Klaatsch also reaffirmed his previous testimony that plaintiff was not a menace to the safety of persons or property of other people and that he found no evidence of any mental disease which should interfere with or contraindicate plaintiff's gainful employment. He testified that he could not estimate the degree of probability

of mental breakdown in most persons in response to varying degrees and conditions of stress. He noted that nothing in the plaintiff's record raised any indication that any mental disorder resulted from any stressful situation occurring in his work. And he also found that the absence of any manifestation of mental disorder following plaintiff's release from hospitalization 8 years earlier was a very favorable indication as to nonrecurrence thereafter. There was likewise no serious challenge by defendant to Dr. Klaatsch's testimony, and there was no witness to contradict him.

After his release from the State hospital and the refusal of IRS to restore him to duty, plaintiff had several jobs. He did tax work for a certified public accounting firm from December 1966 to September 1967. In December 1967 he was employed in a tax consulting business by a former Internal Revenue agent who had previously worked with plaintiff. Plaintiff remained in that position until September 1969 and again from August 1970 to April 1971, when the quantity of his employer's business declined. In these employments plaintiff met with the public, worked with clients and with IRS agents and other office employees. Some of such people knew of plaintiff's involvement in the 1965 incident, but there is no evidence that it ever caused a problem. His employer found his work accurate and completely satisfactory and would reemploy plaintiff again if the work load were sufficient to warrant it.

Plaintiff has also worked at several temporary positions with the United Givers Fund, the Interstate Housing Corporation, several accounting firms and the Federal National Mortgage Association. He was employed by the latter at the time of trial.

During plaintiff's entire period of private employment since 1966 plaintiff has experienced no difficulties attributable to any mental disorder, in performing his work and in his dealings with the public, clients, or IRS representatives. There is also no evidence that any of his employers have been adversely affected in any way by reason of the events of May 9, 1965. Furthermore, there is no evidence that since March 1966 plaintiff has had any mental or physical impairment which would preclude his being able to perform the duties of his former position in IRS.

Of three IRS employees who had worked with plaintiff prior to May 9, 1965, one testified that if plaintiff were reemployed it would not adversely affect his own performance and he would not feel particularly uncomfortable with him, another had no present apprehension about working with plaintiff, and a third did not know whether plaintiff's restoration would affect him or not.

Defendant produced Mr. Victor Cuniglio, Director of the Income Tax Division in the Office of the Assistant Commissioner, Technical, who has overall supervision over the Internal Revenue agents in the National Office of the Service dealing with income taxes, who testified with respect to the manner in which plaintiff's conduct constituted such cause for removal as would promote the efficiency of the Servic Cuniglio stated that because of the many thousands of contacts between Internal Revenue personnel and taxpayers and the dependence of the tax system upon a high degree of voluntary compliance, it is essential that Internal Revenue personnel be known to have the highest moral standards of conduct and integrity. He said that the commission of a homicide is inconsistent with such standards of conduct and, hence, is cause for removal to promote the efficiency of the Service. The fact that the individual was mentally ill during the homicide and that the illness caused him to commit the act would not be deemed a

sufficiently mitigating circumstance to change the result. Nor would it be relevant that the employee is cured at the time of his removal or at the time he seeks reinstatement.

Throughout the administrative history of this controversy, and in his brief, plaintiff's counsel has contended that his discharge was defective because the notice to plaintiff with respect to the proposed removal was based solely upon his having been charged with a crime, that of murder. Plaintiff urges that acquittal on the criminal charge wipes out the cause for removal. Since he was acquitted after he was removed, plaintiff urges he should now be reinstated.

The short answer to this contention is that neither the notice nor removal was based upon the fact that the State of Maryland had charged plaintiff with a crime. This was, indeed, a cause for plaintiff's *suspension.* Removal was, however, based upon plaintiff having conducted himself in a manner which brought discredit upon the IRS by fatally shooting a human being. Therefore, the fact that the State charged him with a crime and that he was later acquitted of it is not dispositive. Facts constituting cause for removal of a Federal employee need not be criminal conduct. Indeed, removals have been sustained even where the employees have been acquitted of the same charges in criminal trials. *Finn v. United States,* 152 Ct. Cl. 1 (1961); *Croghan v. United States,* 116 Ct. Cl. 577, 89 F. Supp. 1002, *cert. denied,* 340 U.S. 854 (1950); *Prater v. United States,* 172 Ct. Cl. 608 (1965); *Finger v. Caplin,* 344 F.2d 38 (2d Cir.), *cert. denied,* 382 U.S. 883 (1965).

Although the notice was sufficient to support the discharge, the IRS action with respect to it was of dubious fairness. IRS notified plaintiff he had the right to reply both in writing and in person, and to furnish affidavits and evidence showing cause why he should not be removed.

But at the time IRS delivered that notification to plaintiff at the Rockville jail it knew he was charged by the State with the commission of a capital offense and was incarcerated without bond. Certainly he was in no position to appear before his employer in person, and it is fair to infer that his opportunity to defend himself in other ways against his proposed dismissal was likewise restricted at the time. His then attorney also reasonably concluded that his own duty was to devote himself fully to the defense of the claim made by the State against plaintiff's life rather than that made by his employer against his job.

Having already suspended plaintiff from duty until the matter was finally adjudicated and knowing that he was incapacitated from serving in any event, there was no pressing need for the Service to consummate his discharge prior to the time plaintiff could properly put in his own defense. The better practice would undoubtedly have been for IRS to await the disposition of the criminal charges before initiating the proceeding to oust him permanently from his position. *Cf. Silver v. McCamey*, 221 F.2d 873, 874-75 (D.C. Cir. 1955); *Finfer v. Caplin, supra; Polcover v. Secretary of Treasury*, 477 F.2d 1223, 1232 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973).

Plaintiff also claims that IRS had no evidence of cause on which to base the removal, but only newspaper reports. It appears that at the time of the removal IRS had before it only the initial investigatory report of May 11, 1965, which set forth merely the fact of the charges made by the police and of plaintiff's arrest for murder, and possibly the newspaper stories.

Neither the statutes nor regulations require the agency in making its charges to rely upon legal evidence of the kind which would be admissible in a court of law, particularly when the employee does not deny the agency's factual

statement of the circumstances constituting cause.[1] On the other hand, the agency must have some evidence to sustain its charge and may not merely make one up and rely upon the employee's inability to disprove it. The Civil Service Commission cautions Government agencies against such conduct. FEDERAL PERSONNEL MANUAL, SUPPLEMENT 752-1, ADVERSE ACTIONS BY AGENCIES, Section S7-2 (1972) states:

> c. Improper connotation. A notice of decision occasionally will refer to the employee's answer in some such manner as: "Your answer has been considered but it fails to refute the reasons for proposing your removal." This is a dangerous practice because it connotes that the agency has considered the answer only in the light of whether it factually disproves the agency's reasons. Actually, of course, the burden is on the agency to prove its own reasons, or at least to find them sustained by the weight of evidence – not on the employee to disprove them.*** Accordingly, the agency should not imply that its decision to take adverse action rests on the employee's failure to disprove the reasons relied on to support that action. This raises a question of whether the agency has stated clearly the reasons for its action. Instead, the agency should make it

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[1] Even with respect to an appellate hearing within the agency, Section 19(14)3.63(4) of the INTERNAL REVENUE MANUAL (1964) provides in part: "***The hearing is an administrative proceeding, not a court proceeding, and legal rules of evidence will not be employed." *See also, Jacobowitz v. United States*, 191 Ct. Cl. 444, 452, 424 F.2d 555, 559 (1970).

> plain that it has considered the employee's answer and has decided to take adverse action because certain reasons have been sustained and because these reasons support the adverse action decided upon.

CIVIL SERVICE REGULATIONS (5 C.F.R. § 771.204 (rev. 1974)), also provides that an agency must include in an employee's appeal file "the material relied on by the agency to support the reasons" in the notice of proposed adverse action and the evidence subsequently developed.

Defendant claims that the newspaper reports were sufficient evidence to support a notice of removal, or at least to put the burden on plaintiff to deny them. Assuming *arguendo* newspaper items may be acceptable in some instances, *e.g.*, with respect to portions of the facts on which they would not be likely to be mistaken, such as the arrest and the charge for which the arrest was made, and where the employee's failure to deny them is a choice freely made and an unequivocal admission in the particular context, the newspaper accounts here can hardly fit such prerequisites. Neither the writers nor their informants were witnesses to the crucial events. Even if one may properly be led to believe therefrom that plaintiff committed a homicide, they cannot be deemed reliable evidence of the circumstances – whether accidental or deliberate, whether in self defense or unprovoked, whether premeditated, in the heat of passion or merely negligent, and whether plaintiff was of sound mind at the time. Furthermore, plaintiff's failure to deny the stories is not an admission of anything, because the circumstances indicate that plaintiff's failure was not a free and unequivocal choice nor intended as an admission.

However, we are spared the necessity of having to decide whether the IRS' actions were inconsistent with plaintiff's constitutional or statutory rights or the applicable regulations by the fact that the Civil Service Commission ordered that the case be reopened and adjudicated on the merits before it.

If the burden was on the agency to support its removal action by minimal standards of satisfactory proof, necessarily the same rule was applicable in the hearing before the Commission, since otherwise an agency could accomplish the same result by making an unsupported allegation against an employee, by improperly ordering his removal because he failed to disprove it, and by then making plaintiff carry the burden of disproving the same charge before the Commission. In a dismissal proceeding the burden is on the Government at every stage. *Weinberg v. Macy*, 360 F.2d 816, 819 (D.C. Cir. 1965); *Ciambelli v. United States*, 198 Ct. Cl. 240 (1972); *Swaaley v. United States*, 180 Ct. Cl. 1, 376 F.2d 857 (1967).

In the Federal criminal law once the defense of insanity is raised, it is a part of the Government's burden to prove that at the time the individual knew the difference between right and wrong and was mentally capable of making the moral judgments for which he is being held responsible. *Davis v. United States*, 160 U.S. 469, 486-93 (1895); *Otney v. United States*, 340 F.2d 696, 697-99 (10th Cir. 1965); *United States v. Bohle*, 445 F.2d 54, 70-71 (7th Cir. 1971). Insanity, lack of knowledge and absence of consciousness of wrongdoing (or *mens rea*) are not merely mitigating circumstances but go to the existence of intent, which (except in rare instances) is a necessary ingredient of the act charged. *Davis v. United States, supra; Morissette v. United States*, 342 U.S. 246, 250, 252, 257 (1952); *Smith v. California*, 361 U.S. 147, 150 (1959).

The action taken here, while not punishment for breach of a criminal law, was described in the original notice as disciplinary for breach of a standard of conduct set forth in a regulation. As sustained by the Civil Service Commission it was that plaintiff had voluntarily and without justification killed a human being. This was a morally reprehensible act inconsistent with the standards of conduct for employees in the Federal Service which brought discredit upon the Service, and hence it was sufficient cause for his removal. As in the case of any other punishment, the Commission was concerned only with past conduct and made no mention of plaintiff's fitness as an employee at the time of its decision. Knowledge, intent and ability to distinguish between right and wrong are as much elements of such a charge as they are in a criminal indictment for the same offense. If insanity is claimed, however, it is reasonable to require the employee to make at least a preliminary showing of mental illness before the agency may be put to the burden of proving sanity and capacity for intent. *Cf. Davis v. United States, supra,* 160 U.S. at 486-87.

The rationale of the Commission's decision is not perfectly clear. Analysis of the opinion of its Appeals Examining Office, which the Commission affirmed, indicates however that it is primarily based on acceptance of IRS' argument that plaintiff's "insanity" was feigned. The opinion states that the plaintiff's action constituted "unlawful killing." It is obvious that the actions of a mentally ill person who does not know what he is doing or cannot distinguish right from wrong is not properly described as "unlawful". The opinion then asserts that, "By virtue of this plea [of insanity] criminal prosecution was not taken against him." The fact is that plaintiff was prosecuted and that he was acquitted because in the absence of intent his conduct did not constitute a crime. The opinion also declares that "plaintiff only escaped punishment by virtue

of a plea of insanity." An insane person does not *escape* punishment since he has not committed a punishable act. It then further states that plaintiff's "unjustified killing" is inconsistent with IRS standards of conduct "regardless of the state of their mind at the time the killing was committed." The actions of an insane person may not be properly described as justified or unjustified since he does not have the necessary intent which is an element of the crime, and if a person is admittedly insane there can hardly be a knowing violation of IRS standards of conduct anymore than there is a violation of the law.

Plaintiff made the necessary preliminary showing by placing in the record of the hearing before the Civil Service Commission the State court docket entries showing his acquittal on the charge of murder by reason of insanity and his release from the State mental hospital after a period of confinement. But IRS put in no evidence whatsoever on the issue. Indeed, the only evidence IRS sought to present before the Commission was that encompassed in the newspaper clippings which it appended to its brief after the record was closed. Apart from any question of reliability, such evidence had no pertinency to the issue of plaintiff's mental state. While plaintiff's evidence did not *compel* the conclusion that he had been insane at the time of the homicide, there was no substantial evidence to support the Commission's contrary determination that plaintiff had *not* been insane and had been mentally and morally responsible for his actions or that his "insanity" did not impair his responsibility.

At this point the question naturally comes up as to whether plaintiff should be faulted for his failure to pursue and exhaust his administrative remedies because he did not submit before the Civil Service Commission all of the evidence with respect to plaintiff's mental condition which

was available to him and which he later used at trial before the court. However, the fault is not wholly plaintiff's. First, the Commission's order setting aside the prior determination and ordering a new adjudication on the merits made no reference to which party would have the burden of proof in this novel situation. Second, after the parties agreed to rely exclusively on documentary evidence for the new record and plaintiff included the State court docket entries showing the adjudication of insanity, IRS' failure to offer any documents or other evidence may have led plaintiff to believe that the Government did not intend to dispute the insanity and there was no need for further proof. It was only after the administrative record was closed that defendant appended to its administrative brief the newspaper clippings with respect to the homicide and made the argument that the insanity plea was merely a device used by plaintiff to escape punishment by pulling the wool over the eyes of a naive prosecutor and State court judge. Finally, defendant has not raised the defense of plaintiff's failure to exhaust his administrative remedies.

An adverse action by an agency against a preference eligible employee "for such cause as will promote the efficiency of the service" (5 U.S.C. § 7512) may be set aside if there is no substantial evidence to support the action or if it is arbitrary or capricious. *Ciambelli v. United States, supra; Louks v. United States,* 184 Ct. Cl. 361, 370, 395 F.2d 993, 997 (1968); *Kowal v. United States,* 188 Ct. Cl. 631, 638, 643, 412 F.2d 867, 870, 873 (1969); *Urbina v. United States,* 180 Ct. Cl. 194, 208 (1967); *Charlton v. United States,* 412 F.2d 390 (3d Cir. 1969). Since it has been found here that there was no substantial evidence to support the determinations of the IRS and Civil Service Commission that plaintiff was morally responsible for his conduct in connection with the homicide, their actions cannot stand and must be set aside.

This leaves for decision the remaining question raised by Mr. Cuniglio at trial, whether the commission of a homicide by a Government employee during the course of a mental illness, even when the employee is not responsible for his acts, may properly be an independent cause for his removal despite the fact that the illness has been cured. As previously noted, in the administrative proceedings neither IRS nor the Civil Service Commission clearly or directly adopted that posture. Their positions were shaped by their conclusions that the insanity defense was made up out of the whole cloth, and IRS argued that while such a sham may have been sufficient to get plaintiff off in the criminal prosecution it was not sufficient to excuse his detrimental conduct for purposes of employment at IRS. This leaves a question as to whether Mr. Cuniglio's flat position in his testimony, that one who has committed a homicide even while insane has reflected sufficient discredit upon the Service as to justify his removal despite his recovery, really represents the considered judgment of the Service. However, defendant also seems to press such argument in its brief by urging that IRS' public image is a legitimate concern of the Service and important to its efficiency, and, by implication, therefore, that the Service has the right to rid itself of anyone who committed a homicide, even unknowingly.

Title 5 U.S.C. § 7512, the Veterans' Preference Act of 1944, was designed to confer a measure of job security on veterans. Insofar as Congress provided therein that an employee having such status may be dismissed "only for such cause as will promote the efficiency of the service", it plainly meant that "the employer agency must demonstrate some 'rational basis' for its conclusion that a discharge 'will promote the efficiency of the service.'" *Norton v. Macy,* 417 F.2d 1161, 1164 (D.C. Cir. 1969). *Accord, Mindel v. United States,* 312 F. Supp. 485, 487 (N.D. Cal.

1970). Although this court has differed with or distinguished the result in the *Norton* case, its reasoning has also assumed the need for a showing of a rational basis. *Schlegel v. United States,* 189 Ct. Cl. 30, 416 F.2d 1372 (1969), *cert. denied,* 397 U.S. 1039 (1970). And *see also, Knotts v. United States,* 128 Ct. Cl. 489, 121 F. Supp. 630 (1954); *Gadsden v. United States,* 111 Ct. Cl. 487, 78 F. Supp. 126 (1948); *Jacobowitz v. United States,* 191 Ct. Cl. 444, 459, 424 F.2d 555, 563 (1970); *Burkett v. United States,* 185 Ct. Cl. 631, 640-41, 402 F.2d 1002, 1008 (1968); *Swaaley v. United States,* 180 Ct. Cl. 1, 376 F.2d 857 (1967).

Both IRS and the Civil Service Commission accept the view that mental illness is not a cause for removal or denial of reinstatement if the employee has recovered. The IRS policy was so conceded by its witness, Mr. Cuniglio. The Civil Service Commission policy, set forth in FEDERAL PERSONNEL MANUAL, Chapter 306, 5-2 (1969), is that, "As a general rule, a history of mental illness is not disqualifying for Federal employment provided that recovery has been certified by competent medical authority and the applicants are capable of performing the duties of the position without hazard to themselves or others***." Thus, subchapter 5-2 provides both for initial employment and for reinstatement if the employee has previously been dismissed for reasons attributable to mental illness. *See also, Manzi v. United States,* 198 Ct. Cl. 489, 493 (1972).

The charge herein upon which plaintiff's dismissal was based was a disciplinary one. He had violated Section 1941.4 of the U.S. TREASURY DEPARTMENT RULES OF CONDUCT *for* INTERNAL REVENUE SERVICE *Employees* (Rev. 10-63) by conducting himself in a manner which brought discredit upon the IRS. It would be odd if cured mental illness is not disqualifying for Federal

employment, yet the employee may still be subject to disciplinary dismissal for his conduct which resulted from the illness. It is not reasonable to construe the Rules to threaten sanctions for anything less than volitional or conscious behavior. *Cf. Morissette v. United States,* 342 U.S. 246 (1952).

Good public relations is a desideratum of every employer Government agency, since even if it does not deal directly with the public at the least it depends on the public's goodwill for its appropriations. But it is difficult to believe that in enacting the Veterans' Preference Act of 1944, Congress intended to permit an agency to achieve the purpose of acquiring or maintaining a good public image at the price of dismissing veterans as disciplinary measures for conduct for which they may have been wholly without fault.

There is no need to remand the matter to the Civil Service Commissioners for their decision since the proof before this court is clear, unequivocal and uncontradicted, and the administrative agency can only make one finding of fact. *See Kowal v. United States,* 188 Ct. Cl. 631, 412 F.2d 867 (1969); *Maxwell Dynamometer Co. v. United States,* 181 Ct. Cl. 607, 631, 386 F.2d 855, 870 (1967); *Spokane Tribe of Indians v. United States,* 163 Ct. Cl. 58, 70-71 (1963). In view of the lack of challenge we must accept the truth of the credible testimony of the qualified expert, Dr. Hamilton, at the trial in this court that at the time of the homicide plaintiff was mentally ill and unable to know the nature and character of his actions nor the difference between right and wrong as related to such actions. Similarly, the unchallenged testimony of both Drs. Hamilton and Klaatsch, as well as the evidence with respect to plaintiff's conduct in the 8 years since the tragedy, is equally convincing that since his release from the Springfield State Hospital plaintiff has not represented a threat

to the safety of persons and property of co-workers or the members of the public with whom he may have occasion to deal in his work.[2] Plaintiff has continued to work as a tax advisor outside of IRS, and defendant does not question his continuing technical proficiency. On the basis of the present record there is no substantial evidence and the Civil Service Commission could not properly find that "cause" exists for plaintiff's discharge or the failure to reinstate him.

FINDINGS OF FACT

1. Prior to his removal on June 18, 1965, plaintiff was employed as an agent of the Internal Revenue Service (IRS), grade GS-12. As a veteran he was a preference eligible within the meaning of 5 U.S.C. § 2108 and entitled to the protection afforded such employees by 5 U.S.C. § 7512. Plaintiff now seeks to obtain back pay from March 29, 1966, together with restoration to duty.

2. Plaintiff was first employed by the IRS in June 1951, as an Internal Revenue Agent at grade GS-7 upon passing the appropriate qualifying examination. His beginning service computation date, *i.e.*, a constructive date giving effect to all his creditable military and civilian service, is March 9, 1948.

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[2] In his brief plaintiff puts emphasis upon the fact that his work does not necessitate a great deal of contact with the general public, but involves mostly work with other IRS personnel. However, the argument appears to have no independent significance, since IRS is entitled to protect the safety and sensibilities of its employees to the same degree as it protects those of the public. In any event, in view of the decision herein there is no need to discuss the proposed distinction further.

3. He was first assigned to the IRS Baltimore office auditing taxpayers' returns. From 1954 to 1961, he was assigned to field offices in the Washington metropolitan area, first in Silver Spring, Maryland, and then in downtown Washington, D.C., achieving a grade GS-11 in such position.

4. In June 1961, plaintiff applied for and received a transfer and promotion to the position of tax law specialist, grade GS-12, in the Office of Assistant Commissioner (Technical), Tax Rulings Division, Corporation Tax Branch, Earnings and Profits Section, of the National Office of IRS. In September 1962, the position was redesignated as Internal Revenue Agent, but the grade and duties remained the same.

5. Plaintiff was one of approximately 10 agents in this section. Their principal duty was the analysis of corporate surplus accounts to determine the extent to which corporate distributions in the hands of their stockholders were deemed to be out of accumulated or current earnings and profits and hence were to the recipients taxable dividends, rather than returns of capital. The analyses were made primarily from corporate submissions of balance sheets, earnings statements and prior income tax returns going back to the year 1913. Although the work was national in scope, it was substantially performed in Washington, D.C. The data was submitted by corporate accountants, comptrollers, attorneys and other representatives, either voluntarily or at IRS request. Where added verification or clarification was necessary, it was obtained from revenue agents' reports on prior audits of corporate income tax returns, or occasionally upon written requests to revenue agents in the field.

Revenue agents generally are in constant contact with the public. However, in the work to which he was then assigned, the need for contact by plaintiff with persons outside the IRS was limited. While he corresponded with corporate representatives or occasionally discussed matters with them on the telephone, actual personal dealings were infrequent. The preparation and conduct of all kinds of business communications with the public were estimated to consume 30 percent of plaintiff's working time, but actual personal dealings were less than 10 percent. Where corporate representatives requested personal conferences, the standard procedure was for them to meet with plaintiff's section chief in her office, accompanied by plaintiff, rather than with plaintiff alone.

6. During the course of his employment in the Earnings and Profits Section, plaintiff collaborated with his section chief in publishing a technical manual (REV. PROC. 65-10) which explained to corporations the technical format followed in earnings and profit analysis by the IRS.

7. At all times during the period of his employment at IRS, plaintiff received a satisfactory performance rating.

8. In May 1965, plaintiff was approximately 41 years old. He had been separated from his wife for about 3 years and was seeking a divorce to which at that time she refused consent. Two of his four children were living with him. For the prior 16 months he had been living in Rockville, Maryland with a 28-year-old woman, Winifred O. McLaughlin, whom he intended to marry and move with to San Francisco as soon as it became feasible. In anticipation of this, in April 1965 plaintiff initiated a request for transfer to the San Francisco office of the Appellate Division of IRS. This transfer was being processed at the time of his removal. On Sunday afternoon, May 9, 1965, plaintiff was driving Miss McLaughlin in his car to Friendship

Airport where she was to depart for San Francisco alone. While the car was on the Capitol Beltway in Silver Spring, Maryland, and for reasons and under circumstances not disclosed by the record, an altercation took place between them, they both left the car, and plaintiff shot and killed Miss McLaughlin with a gun she carried in her purse, which plaintiff had given her a long time previously for her protection.

9. Plaintiff stayed with her body and made no effort to flee. He was arrested on the scene by Montgomery County Police, charged with murder and held without bond at the Montgomery County jail in Rockville, Maryland.

10. Under date of May 11, 1965, an IRS inspector filed a special investigation report concerning plaintiff which stated in total as follows:

> Montgomery County, Maryland, Police advised on 5/10/65, that employee had been arrested at approximately 3:30 p.m., on 5/9/65, by that agency and charged with murder. Employee currently being held, without bond, at Montgomery County jail, Rockville, Maryland.

BASIS FOR INVESTIGATION

Request from the Office of the Director, Internal Security Division, Internal Revenue Service, received May 10, 1965.

DETAILS OF INVESTIGATION

At approximately 9:00 a.m., Monday, May 10, 1965, Capt. Fred P. Thrailkill, Chief of Detectives, Montgomery County Police Department, Rockville, Maryland, advised the writer that his Department had arrested the employee. Captain Thrailkill further advised that the employee had been charged with murder of one Winifred O. McLaughlin of 1001 E. Montgomery Avenue, Rockville, Maryland. Captain Thrailkill advised that the employee was arrested at approximately 3:30 p.m., Sunday, May 9, 1965, on Route 495, opposite the Sligo golf course and, further, that he is currently being held, without bond, at the Montgomery County jail, Rockville, Maryland.

Captain Thrailkill further stated that he had information that WATHEN had been residing with Winifred McLaughlin at 1001 E. Montgomery Avenue, Rockville, Maryland, since July 1964.

Captain Thrailkill advised that as of this time the employee will have a preliminary hearing on May 19, 1965, at the Peoples Court of Montgomery County, Silver Spring, Maryland, and, further, that the case will probably be presented to the Montgomery County Grand Jury on the first Monday in June 1965.

Captain Thrailkill stated that WATHEN was previously arrested by the Montgomery County Police Department on a "Peace Warrant" which was sworn to by WATHEN's wife.

Further information will be furnished in a subsequent report.

This was the only investigative report about the incident which was filed prior to his discharge.

11. On May 11, 1965, the Director, Tax Rulings Division, Internal Revenue Service advised plaintiff in part:

> This letter constitutes a notice of proposed adverse action in accordance with Part 752 of the Civil Service Commission's regulations.
>
> On May 9, 1965, you were arrested by the Montgomery County, Maryland, police on the charge of Murder. The arrest was based on the allegation that you killed Miss Winifred O. McLaughlin of 1001 E. Montgomery Avenue, Rockville, Maryland, at approximately 3:30 p.m., Sunday, May 9, 1965, on Route 495, opposite the Sligo golf course. Conviction on this charge could result in capital punishment or a prison sentence.
>
> I consider such behavior, if substantiated, to be so detrimental to the interest of the Revenue Service that you cannot be kept in an active duty status while it is being investigated and adjudicated by the Service. If substantiated, such behavior will result in severe disciplinary action. Therefore, it is proposed, in order to promote the efficiency of the Internal Revenue Service, to suspend you from duty without pay, in not less than give (5) calendar days from the date you receive this notice until the Service can investigate the allegations and take final action on this matter.
>
> You have the right to reply to this notice both in writing and in person and to furnish affidavits and evidence showing cause, if any, why you should not be suspended as proposed.

The letter also took notice of the fact that plaintiff was being held by the police without bail and thus was not available for duty in any event.

12. On May 14, 1965, the same official of the IRS wrote to plaintiff (in pertinent part):

> By letter of May 11, 1965, from this office, you were notified that it was proposed, in order to promote the efficiency of the Internal Revenue Service, to suspend you from duty without pay until the Service can investigate and adjudicate, as far as the Service is concerned, the charge placed against you by the Montgomery County, Maryland, Police Department on May 9, 1965.
>
> The May 11 notice informed you of your right to reply in writing and in person. The time for your reply has passed and we have received none. In view of this, final decision on the suspension has been based on the evidence of record. After carefully considering the nature of the allegation upon which the charge was based; the evidence presently available to us; and the interest of the Internal Revenue Service, I find that your suspension is warranted. Accordingly, you will be suspended from duty without pay from May 18, 1965, until your status with the Revenue Service is adjudicated.

The record in this case does not disclose that the IRS then had other "evidence of record" than the investigative report set out in full at finding 10, and possibly the newspaper stories concerning the events.

A notification of personnel action followed, making the suspension effective May 18, 1965, and to continue "until Service can investigate and adjudicate charge placed against him by the Montgomery County, Maryland, Police Department on May 9, 1965."

13. On May 14, 1965, the Director, Tax Rulings Division, again wrote to plaintiff, this time stating (in pertinent part):

> It is proposed, in order to promote the efficiency of the Internal Revenue Service, to remove you from the Service, in not less than thirty (30) calendar days from the date you receive this notice on the basis of the following charge:
>
> Charge: Violation of Section 1941.4 of the "Rules of Conduct for Internal Revenue Service Employees" (Revised October 1963).
>
> (Section 1941.4 states, in part: "The effectiveness of the Revenue Service in serving the public interest depends upon the extent to which the Service and its [sic] employees hold the confidence and esteem of the Nation's citizens. This means that each employee must do his part to maintain this confidence and esteem –; by conducting himself during and outside working hours in a manner which will bring credit upon the Service; and by observing the spirit, as well as the letter, of the laws and regulations, and

Revenue Service and Treasury Department requirements governing employee conduct. Employees whose conduct does not conform to the rules may be removed from the Service or may be the subject of other disciplinary action.")

Specification: On Sunday, May 9, 1965, you conducted yourself in a manner which brought discredit upon the Internal Revenue Service by fatally shooting Miss Winifred O. McLaughlin.

You have the right to reply to this charge and specification both in writing and in person and to furnish affidavits and evidence showing cause, if any, why you should not be removed from the Service.

14. On June 4, 1965, the same IRS official notified plaintiff (in pertinent part):

By letter of May 14, 1965, from this office, you were notified that it was proposed, in order to promote the efficiency of the service to remove you from the Service on the basis of the charge and specification contained therein.

The May 14 notice informed you of your right to reply in writing and in person. The time of your reply (May 28) has passed and we have received none. In view of this, final decision on the removal has been based on the evidence of record. After a thorough review of the evidence available to us, I find that the charge and the specification are fully supported by the evidence and warrant your removal from the Service. Accordingly, you will be removed from

the Internal Revenue Service effective June 18, 1965.

Again, the record fails to show that the IRS then had any "evidence of record" upon which it relied for this action other than the investigative report fully set out in finding 10 and possibly the newspaper reports.

The notification of personnel action effecting plaintiff's removal on June 18, 1965, stated that it was "because of misconduct which brought discredit upon the Internal Revenue Service, namely, committing homicide."

15. An IRS employee in the Office of the Assistant Commissioner (Technical) delivered copies of the aforesaid personnel actions and notices to plaintiff at the jail in June 1965. Plaintiff in turn gave the letters to the attorney who represented him in the Montgomery County criminal proceedings for response. His attorney deemed it in the best interest of plaintiff to concentrate on the defense of the criminal case, rather than to concern himself with any response to the IRS charges which he stated, "were predicated upon the same offense alleged" in the criminal case, and to seek restoration to duty only after he was cleared of the criminal charges. Such attorney had no experience in Civil Service matters.

16. Plaintiff was indicted for murder on June 8, 1965, and was arraigned on June 23, 1965. He entered a plea of not guilty by reason of insanity. On July 15, 1965, the Montgomery County Circuit Court ordered plaintiff committed to a State hospital to report to the court, first, whether Mr. Wathen was of such mental capacity at the time of the examination to be considered competent for trial; and, second, what Mr. Wathen's mental condition was at the time of the alleged offense in relationship to his

capacity to distinguish right and wrong or to know the nature and consequences of his acts as applied to himself.

17. Pursuant to the court's order on July 30, 1965, plaintiff was committed to the Clifton T. Perkins State Hospital at Jessup, Maryland, where he remained until November 16, 1965. During that period he was assigned to an observation ward for 30 days; he was subjected to psychiatric examination by a physician; he was given a battery of psychological tests by a clinical psychologist and his social circumstances, past environment, employment, relatives and other pertinent incidents of his life were investigated by a social worker. After a 90-day period the hospital superintendent and the staff correlated and synthesized the police reports, the statements of witnesses to the homicide, plaintiff's contemporaneous behavior and words, the clinical evaluations of the staff, the supporting examinations and the corroborative information.

18. On November 1, 1965, Dr. John M. Hamilton, Superintendent of the Clifton T. Perkins State Hospital, reported to the court (in pertinent part):

> Since being in the Clifton T. Perkins State Hospital, Mr. Wathen has received a comprehensive psychiatric evaluation with psychological testing, social service investigation, electroencephalography and other pertinent clinical and laboratory studies. He was presented before a Medical Staff Conference, on October 21, 1965. It was my opinion at that time that Mr. Wathen was competent for trial. At the time of the examination, Mr. Wathen had the mental capacity and reason to be able to properly distinguish between right and wrong and to know the nature and consequences of his acts as applied to himself.

> A definitive opinion concerning his reponsibility for his actions at the time of the alleged offense, however, is difficult to give because of the complex circumstances surrounding Mr. Wathen's reported behavior at the time of the alleged offense and the disclosure of factors brought out by our evaluation. Mr. Wathen has rather consistently claimed to have a total amnesia for the period of time from the emergence of the victim from his parked auto until he found himself standing over her at which time he noticed that "she was hurt". Our evaluation indicates that this seems to be a true amnesia.
>
> The problem of responsibility, then, seems to depend upon the kind of explanation that can be validly developed to account for the amnestic period. There are three possibilities which present:
>
> 1. Our evaluation disclosed that Mr. Wathen had ingested a significant, though exactly unknown, quantity of alcohol on the day of the alleged offense; and, that he had not had a significant amount of food intake over the same period of time. It is possible that Mr. Wathen may, then, have suffered from a diminished level of consciousness at the time of the alleged offense, (commonly known as the "alcoholic blackout").
>
> 2. The amnesia may represent a post-incident (post-crime) development as representing a self-protective dynamic device, on Mr. Wathen's part, to shield himself from the trauma of confrontation with a totally ego-alien bit of behavior.

3. The period of unawareness, at the time of the alleged offense, may represent a true Dissociative Reaction.

The clinical psychiatric and psychological examinations indicate that Mr. Wathen has the kind of personality which is seen in individuals who experience periods of dissociation when faced with apparently insurmountable stress and emotional trauma. In addition to this, Mr. Wathen has no previous criminal involvement and the crime of which he is accused was a completely irrational one, on its face, as no logical motivative purpose could be served by it.

It is my feeling, in view of my examinations, that most likely Mr. Wathen underwent a Psychoneutrotic Dissociative Reaction at the time of the alleged offense and that, at the time of the alleged offense, he was probably of such mental incapacity and reason so as not to be able to properly distinguish between right and wrong, nor to know the nature and consequences of his acts as applied to himself.

19. On December 8, 1965, the State moved to dismiss the murder indictment against plaintiff. On the same day the Montgomery County Circuit Court held a trial. At such trial the State called Dr. Hamilton as its witness. In his testimony he reiterated and elaborated on what he had stated in his report. His conclusion was that –

> Mr. Wathen indeed had on the occasion of this crime suffered a dissociative episode and because of this *** he was not responsible for his actions at the time; that is, he did not have the capacity or reason to distinguish right and wrong

> or to know the nature and consequences of his acts as applied to himself.

He also testified that as of November 1, 1965, and the date of trial Mr. Wathen was competent to stand trial, but that he continued to suffer from psychoneurotic illness accompanied by depression; and although the dissociative reaction was in remission at the time it was likely to recur unless the plaintiff received intensive psychotherapy under the supervision of a psychiatrist. At the same time Dr. Hamilton was of the view that plaintiff's illness did not make him a risk to others, but that absent treatment he was a risk to himself becuase he might commit suicide. And he was of the further opinion that with the intensive psychiatric treatment Mr. Wathen's prognosis was good and there was a good possibility that he could return to his previous level of responsibility.

20. The court found from the testimony that the plea of not guilty by reason of insanity was justified because in contemplation of law plaintiff was insane at the time the alleged crime was committed and did not know the difference between right and wrong or the nature and consequences of his acts as they pertained to himself. The court also found that, although plaintiff was competent to stand trial, he was suffering from a mental disease and was a danger to himself. The court further found that despite the psychiatric opinions plaintiff was also a menace to other people and the property of others, requiring confinement and treatment until cured. It quashed the murder indictment, but ordered plaintiff committed to the Springfield State Hospital for the intensive psychiatric treatment recommended by Dr. Hamilton.

21. Plaintiff remained in the Springfield State Hospital from December 8, 1965, until March 29, 1966. Shortly before the latter date plaintiff applied to the Montgomery

County Circuit Court for release, and on that date the court held a trial with the aid of a jury to determine plaintiff's sanity. At such trial the only witness was Dr. Heinz H. Klaatsch, a medical doctor and psychiatrist in charge of the Mental Division of the Springfield State Hospital. Dr. Klaatsch testified that he had plaintiff under his care since December 8, 1965; that plaintiff had also been evaluated by another psychiatrist; that plaintiff had been the subject of several psychiatric staff meetings; and that plaintiff's electroencephalogram tests had been evaluated. He concluded that plaintiff was not then insane and had not been insane at any time since he had been at such hospital; was not a danger to himself; was not a menace to the safety of others or the property of others; had no mental disease or derangement; and that plaintiff's release from the hospital would be consistent with the safety of persons and property in general. He further stated that in his opinion at the time of that trial plaintiff knew the difference between right and wrong and understood the nature and significance of his actions as applied to himself.

Although Dr. Klaatsch also stated the opinion that "if Mr. Wathen should suffer a mental disease which he does not have now, he could certainly be a danger to others and himself", he was not asked and expressed no opinion as to the probability of any recurrence of conduct dangerous to others.

The court instructed the jury that the burden was upon plaintiff to prove his sanity by a fair preponderance of the evidence, and that –

> A person is insane within the meaning of the law when he does not have the capacity and reason sufficient to enable him to distinguish right and wrong and understand the nature and consequences of his actions as applied to himself; or, when by reason of mental disease or derangement

> he is reasonably likely to menace the safety of himself or the person or property of others.

The jury found plaintiff sane, and on the same day the court released him.

22. On April 6, 1966, plaintiff went to the Office of the Chief of the National Office Branch in the Personnel Division of IRS to present himself for duty. He was advised that any consideration of his restoration would have to be made by filing a written appeal. Within a few days thereafter plaintiff retained an attorney for this purpose.

23. On May 17, 1966, plaintiff filed his written appeal with the Internal Revenue Service seeking reversal of the removal action and restoration to his prior position. By letter of June 2, 1966, the Director of the Personnel Division of the Service denied plaintiff's appeal as being out of time.

24. On June 13, 1966, plaintiff filed an appeal for resotration to duty with the Appeals Examining Office of the Civil Service Commission. On August 10, 1966, the appeal was denied on the ground that plaintiff had not filed a timely appeal to the Agency from the separation notice of June 1965.

25. On August 16, 1966, plaintiff filed an appeal with the Board of Appeals and Review of the Civil Service Commission seeking review of the adjudication by the Appeals Examining Office, and by decision dated December 7, 1966, the Board sustained the determination of the Appeals Examining Office.

26. On December 23, 1966, plaintiff sought review of this denial by the Civil Service Commissioners, and by notice of May 24, 1967, the Commissioners ruled that –

Mr. Wathen's case should be reopened and adjudicated on the merits. Accordingly, Mr. Wathen's case is being remanded to the Commission's Appeals Examining Office for further development and a new adjudication.

27. On June 22, 1967, plaintiff, acting through his counsel, held a conference with counsel for the Internal Revenue Service for the purpose of reconsidering the question of his restoration to duty. The Service declined to effect the restoration. Plaintiff then proposed and the parties agreed that the matter would be submitted to the Civil Service Commission for adjudication on the merits via stipulation of documents, without necessity for a hearing. The appeal was so submitted to the Commission for determination in September 1967.

In his documentary exhibits plaintiff included a transcript of the docket entries in the Circuit Court for Montgomery County, Maryland, in the criminal proceedings against plaintiff on the indictment for murder, referred to in findings 16-20, *supra*. Such transcript included the following docket entries:

November 24, 1965	– Defendant's plea of insanity filed.
* *	* * *
December 8, 1965	– State confesses a plea of not guilty by reason of insanity filed.
December 8, 1965	– The Court, Judge Moorman, finds Defendant not guilty by reason of insanity.
December 8, 1965	– Hearing before Judge Moorman, Miss Wissenbach reporting.

December 8, 1965	– The Court orders Defendant committed to Springfield State Hospital.
December 8, 1965	– Order of Court committing Defendant to Springfield State Hospital filed and copies issued.

Plaintiff also included a transcript of the docket entries in the civil proceeding in which plaintiff was found to be sane and released from the Springfield State Hospital in March 1966, referred to in finding 21, *supra*.

In the proceedings before the Civil Service Commission Appeals Examining Office plaintiff did not offer the reports, nor the transcripts of the testimony of Drs. Hamilton and Klaatsch before the Montgomery County Circuit Court referred to in findings 18, 19 and 21, *supra*.

The IRS included no statements of witnesses, nor any investigatory reports in its documentary exhibits to establish the circumstances of plaintiff's conduct sufficient to warrant removal for cause. However, in an appendix to its brief or memorandum of argument to the Appeals Examining Office it attached photocopies of five clippings from three Washington, D.C. newspapers which were published shortly after the homicide.

28. In his argument to the Appeals Examining Office of the Commission plaintiff urged that his removal was based solely on the charge made against plaintiff by the IRS that he had been arrested and indicted for the crime of murder by the State of Maryland; and that since he had been acquitted of the criminal charge by reason of insanity, Civil Service Commission regulations required his restoration to duty.

In its argument the IRS denied that plaintiff's removal was based on the charge that he had been arrested and indicted, but rather on his failure to deny that "he fatally shot Miss McLaughlin [and] that in so doing he brought discredit upon his employer." It claimed that the newspaper stories in its appendix constituted substantial evidence to support the removal. With respect to plaintiff's acquittal, the IRS stated:

> According to appellant's Exhibit 7 [the docket entries], it appears that he was not acquitted by a jury but was in reality acquitted by the State's Attorney. While it is of no concern to the Internal Revenue Service how the State of Maryland administers its criminal laws, it would be of grave concern to the Service if a State's Attorney could, by his handling of a criminal case, deprive the Service of its right and duty to remove an employee whose conduct was patently offensive and discrediting to the Service.***

The IRS referred to no evidence that would tend to establish the action of the State's attorney or Maryland court was improper or mistaken. Further, as reflected in findings 19, 20 and 27, *supra*, the IRS statement that plaintiff "was in reality acquitted by the State's Attorney", rather than the court, is untrue.

29. On April 4, 1968, the Chief of the Appeals Examining Office of the Commission notified plaintiff of his decision sustaining the action of the IRS in removing him. With respect to the IRS procedures he found that plaintiff was properly notified of the reasons for removal and the action was properly taken after plaintiff failed to reply to the notice. With respect to the merits he ruled (in pertinent part):

The undisputed facts of this case are: On Sunday, May 9, 1965, the appellant discharged a gun into the body of Miss Winifred O. McLaughlin, from which wound she died. The shooting was not done in self-defense and the act itself can be fairly described as the unlawful killing of a human being. The appellant was arrested and an indictment for murder was filed against him. He filed a plea of not guilty by reason of insanity. By virtue of this plea, criminal prosecution was not taken against him. The record indicates the appellant was committed to the Springfield State Hospital.

On about March 29, 1966, the appellant was found sane and released from the hospital, according to the record on file. The removal action against the appellant is based upon the fact that he did kill a human being and this act of killing violates standards of conduct required for retention on the rolls of the Internal Revenue Service.

* * * * *

As noted hereinbefore, there is no allegation in the record that the killing of this human being was done pursuant to authority of law or in self-defense. In no sense then can it be a justifiable homicide as attorney for the appellant states. The situation requires no long discussion. The fact of the matter is that an Internal Revenue Agent has killed a human being, and has only escaped punishment by virtue of a plea of insanity. It is a simple conclusion of fact that the unjustified killing of a human being is inconsistent with the standard of conduct for employees in the Federal Service regardless of the state of their mind at the time the

killing was committed. Therefore, we find the appellant's removal was for a cause which promotes the efficiency of the service.

30. On April 9, 1968, plaintiff filed a timely appeal with the Board of Appeals and Review of the Commission. Again the IRS representative erroneously stated, "The plain fact is that appellant was never tried; it was the prosecutor – not the court – which found appellant 'not guilty by reason of insanity'." By letter of June 28, 1968, the Board affirmed the previous decision of the Appeals Examining Office and declined to order plaintiff's restoration. The Board's decision made no mention whatsoever of the insanity judgment or defense. It only discussed the nature of the charge, and found that plaintiff was charged with the act of killing a human being rather than merely being accused of a crime.

31. By notice of August 2, 1968, plaintiff requested the Civil Service Commissioners to reopen and reconsider the decision of the Board of Appeals, but by decision dated December 9, 1968, the Commissioners without opinion declined to reopen the appeal.

32. After his release and the refusal of IRS to restore him to duty, plaintiff did tax work for a CPA firm on a temporary basis from December 1966 until September 1967. Plaintiff was next employed in December 1967 by a former Internal Revenue agent, who had established a private tax consultant business. This tax consultant had worked with plaintiff in IRS, knew what plaintiff could do and thought plaintiff was a good agent. He hired plaintiff to do general accounting work. Plaintiff worked initially for this tax consultant from December 1967 to September 1969 and again from August 1970 until April 1971 when the lack of business caused plaintiff's termination. During these periods of employment plaintiff met with the

public, worked with the clients of the consultant, had occasion to have contact with IRS agents, and with other employees in the office. Some of those with whom plaintiff had contact knew of the 1965 incident, but this caused no problem. His employer found plaintiff's work accurate, thorough, and completely satisfactory. If the work load presented itself, this employer would hire plaintiff again.

During the period following his release plaintiff also worked at several temporary positions with UGF, the Interstate Housing Corporation, and also several CPA firms. He worked for Federal National Mortgage Association (Fannie Mae) in 1971. He again went to work with Fannie Mae on September 4, 1973, and was employed by that organization at the time of trial.

33. During the periods of his private employment since 1966, plaintiff has experienced no difficulties attributable to any mental disorder in performing the work, nor in his dealings with the public, clients, or IRS agents.

34. Among IRS employees who had worked with plaintiff in 1965 and were aware of the May 1965 incident, one testified that if plaintiff were reinstated or reemployed it would not affect his performance and he would not feel particularly uncomfortable with him, another had no present apprehensions about working with plaintiff and a third did not know whether plaintiff's restoration would affect him or not.

35. In July 1965, the technical organization in which plaintiff had served underwent a realignment. A new Position Description No. 65-608 replaced the former Description No. 63-102 covering plaintiff's position. The duties of the position were substantially the same. It was simply an updating of the job sheet and a change of organization titles and all GS-512 Series Agents in the Earnings and

Profits Section (then designated as a "Group") were placed under this description number; and had plaintiff remained in the same position, it would have been his description at the time of trial.

36. There is no substantial difference between the position held by plaintiff as it existed in 1965 and as it exists today. Agents serving in the position held by plaintiff have contact generally with representatives of corporations and sometimes corporate officers and not with individual taxpayers. These corporations are from various parts of the country; however, very few are from the Washington metropolitan area. It is still the general practice in this office for the supervisor to attend any conference in which the agent participates. The amount of contact with the public is still very little and is the same today as it was at the time of plaintiff's separation in 1965.

37. At the trial of this case Dr. John M. Hamilton, who had testified on behalf of the State in the criminal proceeding in the Maryland Court, reaffirmed the substance of his prior report and testimony, which are summarized in findings 18 and 19. He explained that usually people who dissociate do so because the nature of the trauma they are experiencing builds up feelings and reactions which are so assaultive upon them as to be extremely destructive if they have to encouter them at the level of consciousness or awareness at which most of us usually operate; so, therefore, a different level of consciousness occurs to keep this traumatic effect from bringing itself to bear on the individual's aware personality.

He also reiterated his opinion that plaintiff did not and does not represent a threat to the safety of other persons. He conceded that since it is difficult to change the basic components of an individual's personality there is always the possibility that plaintiff may suffer another dissociative

episode, or loss of awareness, if he has to face a particular trauma or stress of similar kind and magnitude which attacks him in an area of vulnerability in his personality structure. But, he stated, even if plaintiff suffered such a dissociative episode again, the possibility of an act of violence accompanying any such episode is statistically minute, on the order of 1 in 10,000. He explained that in the nature of this illness, once the catharsis represented by a catastrophic or heinous act involving violence of a destructive nature is discharged, there is seldom if ever a recurrence. Furthermore, in most instances where people suffer dissociative reactions the constellation of events which make it possible for a horrendous or catastrophic event to occur within the context of the dissociation never recurs, so the individual is not placed in that kind of threatening position again. Thus, it is highly unlikely that in any subsequent dissociative episode (should it occur) Mr. Wathen would be involved in any catastrophic happening such as occurred during the last dissociative episode. Dr. Hamilton also stated that his opinion that plaintiff did not represent a threat to the safety of others was reinforced by the fact that during the intervening 8 years between his examination of plaintiff and his current testimony plaintiff had not suffered any amnesic occurrences or other manifestations of similar illness. This indicates a sufficient remission, so that as far as the manifestations of his illness are concerned he may be considered cured.

Defendant did not seriously challenge the foregoing opinion testimony of Dr. Hamilton by way of cross-examination, and it offered no testimony to the contrary.

38. Dr. Heinz H. Klaatsch, who had been a witness in the State court proceedings involving plaintiff's release from custody, also testified in the instant case. After reaffirming his previous testimony summarized at finding 21,

he further specifically expressed the opinion that as of the time of his prior examination in 1966 plaintiff was not a menace to the safety of the person or property of other people; that he had found no evidence of any mental defect that would interfere with, contradict or contraindicate plaintiff's gainful employment; that while there was a possibility of a recurrence of a dissociative reaction to a particular degree and condition of stress by a person who has once suffered it, he personally could not estimate its degree of probability with respect to plaintiff, nor the degree of probability of any violence incident thereto; that there is a possibility of mental breakdown in most persons in response to varying degrees and conditions of stress; that nothing in the plaintiff's record raised any indication that any mental disorder resulted from any stressful situation at work; and that if in the 8 years following plaintiff's release from hospitalization there had been no manifestation of mental disorder, this was a very favorable indication as to nonrecurrence thereafter. There was no serious challenge to Dr. Klaatsch's testimony and there was no witness to contradict him.

39. U.S. TREASURY DEPARTMENT RULES OF CONDUCT *for* INTERNAL REVENUE SERVICE *Employees* (Rev. 10-63), provide therein, in pertinent part, as follows:

FOREWORD BY COMMISSIONER

* * * * *

The basic mission of the Internal Revenue Service is to foster, to the fullest extent possible, voluntary compliance with the Revenue laws. Confidence in the Service and faith in its dependability and integrity are factors having vital impact on our ability to carry out our purpose. We can maintain public confidence only to the extent that every one of

our contacts with the public reflects the highest ethical and moral standards.

In addition to our daily assigned tasks, each of us has an important public relations role to play. Not only must we act with complete propriety, but we must be sure that none of our actions can be interpreted otherwise.

* * * * *

1941.1 Introduction

Subsections 1941 and 1942 of the Internal Revenue Manual prescribe the rules of conduct required of all employees of the Revenue Service. These rules are not to be considered all-inclusive. The absence of a specific published rule of conduct covering an act tending to discredit an employee or the Service does not mean that such an act is condoned, is permissible, or would not call for, and result in, corrective action or adverse action, including separation when considered necessary, or in the interest of the Revenue Service.

* * * * *

1941.4 General

(1) The effectivness of the Revenue Service in serving the public interest depends upon the extent to which the Service and its employees hold the confidence and esteem of the Nation's citizens. This means that each employee must do his part to maintain this confidence and esteem by performing his work conscientously, courteously, and in the most effective manner possible; by conducting himself during

> and outside working hours in a manner which will bring credit upon the Service; and by observing the spirit, as well as the letter, of the laws and regulations, and Revenue Service and Treasury Department requirements governing employee conduct. Employees whose conduct does not conform to the rules may be removed from the Service or may be the subject of other disciplinary action.

In addition, 5 C.F.R. § 735.209 (rev. 1968), provides:

> An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

40. Mr. Victor Cuniglio, Director of the Income Tax Division in the Office of the Assistant Commissioner (Technical) who has overall supervision over the Internal Revenue agents in the National Office of the Service dealing with income taxes, testified with respect to the manner in which plaintiff's conduct constituted such cause for removal as would promote the efficiency of the Service. Cuniglio stated that because of the many thousands of contracts between Internal Revenue personnel and taxpayers and the dependence of the tax system upon a high degree of voluntary compliance, it is essential that Internal Revenue personnel be known to have the highest moral standards of conduct and integrity. He said that the commission of a homicide is inconsistent with such standards of conduct, and, hence, is cause for removal to promote the efficiency of the Service. The fact that the individual was mentally ill during the homicide and that the illness caused him to commit the act would not be deemed a sufficiently mitigating circumstance to change the result. Nor would it be

relevant that the employee is cured at the time of his removal or at the time he seeks reinstatement.

41. On May 8, 1965, at the time when plaintiff killed Miss Winifred O. McLaughlin, plaintiff was of such mental incapacity and reason so as not to be able to properly distinguish between right and wrong, nor to know the nature and consequences of his acts as applied to himself, and was not responsible for his actions.

42. On April 6, 1966, when plaintiff applied to IRS for reinstatement to the position from which he had been removed, and at all relevant times thereafter plaintiff was recovered from his mental illness, was of sound mind, did not represent a threat to the safety or property of others, and was fully able to perform the duties of such position.

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to judgment restoring him to his position in the Internal Revenue Service and that plaintiff is entitled to recover backpay from April 6, 1966, the date when he became available for duty and applied for reinstatement, until the date of his restoration to duty.

IT IS THEREFORE ORDERED, pursuant to Public Law 92-415, 28 U.S.C. § 1491 and Rule 147(c), that the Commissioner of Internal Revenue be and he is hereby directed to reinstate plaintiff to the position he formerly held in the Internal Revenue Service.

IT IS FURTHER ORDERED that the amount of recovery due plaintiff will be determined in further proceedings pursuant to Rule 131(c).

APPENDIX B

In the United States Court of Claims

No. 249-69

(Decided December 17, 1975)

SAMUEL C. WATHEN, JR. v. THE UNITED STATES

John I. Heise, Jr., attorney of record, for plaintiff.
LeRoy Southmayd, Jr., with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, *Senior Judge*, and BENNETT, *Judge*.

OPINION.

BENNETT, *Judge*, delivered the opinion of the court:

Plaintiff, a former Internal Revenue agent and preference eligible veteran, seeks back pay and reinstatement asserting that both his removal from the service and a subsequent refusal of reemployment were contrary to law and void. This case, rather unusual on its facts, is before us on defendant's appeal from the opinion and conclusion of law by Trial Judge Philip R. Miller.[1]

At all relevant times prior to May 9, 1965, plaintiff was employed in Washington, D.C., in the National Office of the Internal Revenue Service, as a GS-12 tax law specialist. He was one of 10 agents in the Earnings and Profits Section, Corporation Tax Branch, Tax Rulings Division. In May 1965,

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[1] We adopt by reference all of the findings of the trial judge, no exceptions having been taken to them by either party. The findings, which have been furnished to the parties, are not reprinted here as those necessary to the decision are included in the opinion. We reverse his conclusion of law and hold for defendant.

plaintiff, age 41, had been separated from his wife for about 3 years, each having informal custody of two of their four children. A divorce was contemplated at such time as his wife's consent could be secured. For the prior 16 months, plaintiff and two of his children lived in Rockville, Maryland, with one Winifred O. McLaughlin, an Irish alien, whom plaintiff wished to marry as soon as feasible. Plans were made for a move to California, and to that end plaintiff had made application for a transfer to the IRS appellate division office located in San Francisco.

On Mother's Day, Sunday, May 9, 1965, at about 3 p.m., plaintiff and Miss McLaughlin set out by car for Friendship Airport, near Baltimore, Maryland, where she was to depart for San Francisco alone. While the car was on the Capital Beltway in Silver Spring, Maryland, for unknown reasons an altercation took place between them. They left the car, whereupon plaintiff seized a 4-barreled Derringer and killed her with two shots as she sought to flee across the Sligo Creek golf course.

At the scene, Montgomery County police arrested plaintiff, pistol in hand, who offered no resistance. The slaying was witnessed by passing motorists. Authorities placed a charge of murder against Mr. Wathen and held him without bond at the Montgomery County jail. Sensational, front-page publicity ensued. No fewer than five articles in three Washington, D.C., newspapers appeared shortly after the shooting, two of which exhibited a picture of plaintiff and victim and all of which highlighted his employment as an Internal Revenue agent. There was trial testimony by IRS personnel to the effect that accounts were carried on local radio and television news programs. IRS officials assigned a special inspector to ascertain the facts.

Under date of May 11, 1965, the inspector filed his report reciting that the Chief of Detectives of the Montgomery County Police Department had advised that Mr. Wathen had been arrested and charged with Miss McLaughlin's murder and that he was currently being held without bond. On the same day the Director of the Tax Rulings Division, Internal Revenue Service, notified plaintiff by letter of proposed adverse action, namely, suspension from duty without pay in

order to promote the efficiency of the service pending further investigation and adjudication.[2] Plaintiff was represented by a lawyer at the time but no papers were filed opposing such proposed action. Effective May 18, 1965, plaintiff was suspended without pay. The record shows that the suspension was based upon the fact that plaintiff had been arrested and charged with murder.

On May 14, 1965, the Director, Tax Rulings Division, again wrote to plaintiff informing him of further proposed adverse action. In this letter the Director undertook to initiate removal proceedings, and we deem the precise wording of the charge and specification to be sufficiently important to set it out in full below.[3] To us it is clear that while the *suspension* was premised upon plaintiff's arrest, the charge resulting in *removal* was bottomed on the fatal shooting of Miss McLaughlin.

In due course the time allotted for plaintiff's reply ran out with no response by him to the notice of removal. By

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[2] The Lloyd-LaFollette Act, 5 U.S.C. § 652 (1964), provides, in pertinent part:

"No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. * * *." The Veterans Preference Act of 1944, 5 U.S.C. § 863 (1964) [now 5 U.S.C. §§ 3315, 7512, 7701], provides, in part:

"No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing. * * *."

[3] "It is proposed in order to promote the efficiency of the Internal Revenue Service, to remove you from the Service, in not less than thirty (30) calendar days from the date you receive this notice on the basis of the following charge:

"*Charge:* Violation of Section 1941.4 of the 'Rules of Conduct for Internal Revenue Service Employees' (Revised October 1963).

"(Section 1941.4 states, in part: 'The effectiveness of the Revenue Service in serving the public interest depends upon the extent to which the Service and it's [sic] employees hold the confidence and esteem of the Nation's citizens. This means that each employee must do his part to maintain this confidence and esteem * * *; by conducting himself during and outside working hours in a manner which will bring credit upon the Service; and by observing the spirit, as well as the letter, of the laws and regulations, and Revenue Service and Treasury Department requirements governing employee conduct. Employees whose conduct does not conform to the rules may be removed from the Service or may be the subject of other disciplinary action.')

"*Specification:* On Sunday, May 9, 1965, you conducted yourself in a manner which brought discredit upon the Internal Revenue Service by fatally shooting Miss Winifred O. McLaughlin."

letter of June 4, 1965, the IRS notified him of his removal from the service based on the evidence of record as of that date. Such removal actually took effect June 18, 1965. It appears that the record evidence before the agency at the time consisted of the investigative report previously discussed and the media accounts referred to in the testimony, including the various newspaper articles. The notification of personnel action effecting plaintiff's removal stated that it was "because of misconduct which brought discredit upon the Internal Revenue Service, namely committing homicide." It was a considered decision of plaintiff and his then counsel not to respond to the IRS charges while the criminal case was pending.

A Maryland grand jury on June 8, 1965, returned a true bill against plaintiff indicting him for the murder of Miss McLaughlin. At the arraignment on June 23, 1965, a plea of not guilty by reason of insanity was entered, and shortly thereafter the Montgomery County, Maryland, circuit court ordered appropriate psychiatric and psychological examinations. Extensive testing and evaluation followed. It was determined that at the time of the homicide, plaintiff did not know the nature and consequences of his acts nor the difference between right and wrong. The state confessed plaintiff's plea of not guilty. Plaintiff was acquitted of the criminal charge.

The expert testimony at plaintiff's murder trial did not warrant a finding, however, that he was then totally recovered from temporary insanity. Accordingly, the court entered its order of commitment, and plaintiff was remanded to the custody of the Springfield State Hospital, where he remained under treatment from December 8, 1965, until March 29, 1966. On the latter date, the Maryland circuit court once again considered plaintiff's status, this time with the assistance of a jury. The state's medical witness at this trial—the only medical witness—gave it as his opinion that plaintiff was not then insane and had not been insane at any time during his period of hospitalization. The court

declared plaintiff sane, and he was released from custody on the same day.

On April 6, 1966, plaintiff presented himself for duty in the Personnel Division of the Internal Revenue Service.[4] He was then advised that consideration of his restoration to duty could be accomplished only by perfecting a written appeal. For that purpose plaintiff retained counsel who filed the necessary papers. The agency declined to act, noting on June 2, 1966, that plaintiff's appeal was out of time. This action was subsequently approved both by the Civil Service Commission Appeals Examining Office and the Board of Appeals and Review, neither of which reached the merits of the charge and specification on the basis of which plaintiff had been removed for the efficiency of the service.

At this stage plaintiff, by counsel, determined to appeal directly to the Civil Service Commissioners themselves, in a final effort to secure reopening and review on the merits of his removal. By letter dated May 24, 1967, this request was allowed, and the case was returned to the Appeals Examining Office for further development and a new adjudication on the merits. Counsel for the agency and for plaintiff agreed that the case would be submitted on written memoranda without oral hearing.

The submissions to the Appeals Examining Office in plaintiff's behalf included the docket entries of his criminal trial and of the civil proceeding leading to his release from custody. Government counsel adduced no investigative reports, but appended to its papers photocopies of the five clippings from three area newspapers which were published shortly after the shooting.

On April 4, 1968, the Chief of the Appeals Examining Office notified plaintiff of his decision sustaining the removal action of the IRS. The letter opinion found the procedures followed to have been in order, and approved the view on the merits that plaintiff had been removed for such cause as

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[4] Thus, plaintiff returned to his former employer seeking reinstatement less than 1 year after Miss McLaughlin's death. His claim for back pay and reinstatement is for the period from April 6, 1966, which he now represents is the date he was ready, willing, and able to resume work for IRS.

would promote the efficiency of the service.[5] On June 28, 1968, the Board of Appeals and Review affirmed this disposition, and in December of that year the Commissioners declined to reopen the case on plaintiff's request. A petition was filed in this court on May 22, 1969. Plaintiff has been privately employed since his release from custody. Evidence adduced at the trial of the instant claim satisfies us that however impaired plaintiff's mental condition was at the time of the slaying, he is now recovered.

I

Plaintiff, through skilled counsel, has made a determined effort here to convince us that we should decide whether he was discharged for such cause as will promote the efficiency of the service. Thus, we are invited to examine the merits of the removal action. Before the precise questions for decision can be delimited, therefore, we must take care to outline the proper scope of judicial review in this case.

It is long settled that this court limits its review of the administrative action in civilian pay cases to a determination of whether the adverse action disclosed by the administrative record or by a *de novo* trial, or both, is illegal because it violates applicable statutes or regulations, or is demonstrably in bad faith or malicious because it is arbitrary, capricious, or devoid of substantial evidence to support it. Good faith of those taking administrative action is presumed. *Boyle* v. *United States*, 207 Ct. Cl. 27, 515 F. 2d 1397 (1975); *Holman* v. *United States*, 181 Ct. Cl. 1, 383 F. 2d 411 (1967); *Finn* v. *United States*, 152 Ct. Cl. 1 (1961); *Croghan* v. *United States*, 116 Ct. Cl. 577, 89 F. Supp. 1002, *cert. denied*, 340 U.S. 854 (1950). We have stopped short of approaching the merits of such administrative personnel actions, recognizing that the subject is a matter committed to the discretion of the agency involved:

> Whether a person's discharge will promote the efficiency of the service is an administrative decision to be determined within the discretion of the agency, and no court has power to review the action, if taken in good faith. *Brownell* v. *United States*, 164 Ct. Cl. 406, 408–09 (1964); *Gadsden* v. *United States*, 111 Ct. Cl. 487, 489, 78 F. Supp. 126 (1948). * * *. [*Schlegel* v. *United States*, 189 Ct. Cl. 30, 40, 416 F. 2d 1372, 1378 (1969), *cert. denied*, 397 U.S. 1039 (1970).]

In *Schlegel* the court sitting *en banc* distinguished the facts but declined to approve the view of a divided panel of the United States Court of Appeals for the District of Columbia Circuit, as embodied in *Norton* v. *Macy*, 417 F. 2d 1161 (D.C. Cir. 1969). In the latter case there is some language indicating that a court might review a removal to ascertain whether the cause giving rise to such adverse action is rationally related to the efficiency of the service. 417 F. 2d at 1164. That case did not involve homicide. We think that the dissenting opinion of Judge Tamm more accurately reflects the present state of the law, certainly as it is set down in our own decisions. In a more recent case, speaking for the majority, Judge Tamm wrote that where manslaughter was involved or any case involving charges of serious criminal conduct, the nexus may be presumed between the offense and the removal, between the regulation as applied and the statutory standard permitting removal for the efficiency of the service, and that the reviewing courts should not disturb the discretionary determinations of the agency charged by Congress with primary responsibility in this area. He said, "In all cases involving criminal conduct the reviewing courts have uniformly upheld the dismissals as promoting the efficiency of the service." *Gueory* v. *Hampton*, 510 F. 2d 1222, 1226 (D.C. Cir. 1974).

In our estimation the agencies and the Civil Service Commission are far better equipped and in a better position to make these sensitive judgments of whether and how a discharge promotes efficiency of the service. It is their prerogative, not ours, to do so. We do not think that we should lightly substitute judicial oversight for that of the executive

[5] The opinion states in part:

"* * * The removal action against the appellant is based upon the fact that he did kill a human being and this act of killing violates standards of conduct required for retention on the rolls of the Internal Revenue Service.

* * * * *

"As noted hereinbefore, there is no allegation in the record that the killing of this human being was done pursuant to authority of law or in self defense. In no sense then can it be a justifiable homicide as attorney for the appellant states. The situation requires no long discussion. The fact of the matter is that an Internal Revenue Agent has killed a human being, and has only escaped punishment by virtue of a plea of insanity. It is a simple conclusion of fact that the unjustified killing of a human being is inconsistent with the standards of conduct for employees in the Federal Service regardless of the state of their mind at the time the killing was committed. Therefore, we find the appellant's removal was for a cause which promotes the efficiency of the service."

branch in an area where practical considerations of administration and experience should be paramount and where the executive's prerogative and responsibility is to take expeditious action to insure the efficiency and discipline of the huge federal bureaucracy in the interests of good government.[6] As Chief Judge Jones once put it (*Finn* v. *United States*, 152 Ct. Cl. 1, 7 (1961)):

> * * * it is * * * not within our province to pass on the question whether the plaintiff should or should not be employed. *Wittner* v. *United States*, 110 Ct. Cl. 231. In that case the court said at p. 235 the following:
>
> > We are not authorized to determine whether a particular veteran should be employed. * * *. Nor are we concerned with whether an employee should be discharged. That is properly in the hands of the affected department. * * *.

Accord: Crowley v. *United States*, Ct. Cl. No. 93-72, — Ct. Cl. — (Dec. 17, 1975); *Charley* v. *United States*, *Ct. Cl.* No. 83-74, — Ct. Cl. — (Dec. 17, 1975); *Saracena* v. *United States*, 206 Ct. Cl. 90, 508 F. 2d 1333 (1975); *Greenway* v. *United States*, 175 Ct. Cl. 350, *cert. denied*, 385 U.S. 881 (1966); *Harrington* v. *United States*, 174 Ct. Cl. 1110, 1117 (1966); *Knotts* v. *United States*, 128 Ct. Cl. 489, 121 F. Supp. 630 (1954).

As shown by all the foregoing authorities, and by many others which could be cited—for our experience with adverse

[6] "In the present case, the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial [footnote omitted]." [*Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring opinion).]

See also Bowman Transp. Co. v. *Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974), which, while not a personnel case—as are other cases relied upon herein and decided both by the Supreme Court and this court—nevertheless states a similar rule for review in district court actions under the Administrative Procedure Act, 5 U.S.C. § 706 (1970). The APA, of course, does not govern jurisdiction in the Court of Claims. *McGrath* v. *United States*, Ct. Cl. No. 17-75, 207 Ct. Cl. — (order, June 20, 1975).

actions in personnel cases is considerable—we have consistently interpreted determinations of what will promote the efficiency of the service under the Lloyd-LaFollette Act and the Veterans' Preference Act (note 2) as discretionary with the employing agency officials and the Civil Service Commission. As stated above, the proper and historic scope of our consideration is to test whether such determinations are in good faith and supported by substantial evidence, or whether void because arbitrary, capricious, malicious or in bad faith, in excess of legal authority or in violation of statutes and regulations. Plaintiff must overcome the presumption of good faith on the part of the administrative officers. It requires almost irrefragable proof to demonstrate abuse of discretion sufficient to overcome the presumption. It is not even necessary that the court find that the agency construction is the only reasonable one or that it is the result the court would have reached had the question been permitted to arise in the first instance in judicial proceedings. It is enough if the decision has a rational basis by the standards enunciated and in the case law relied on here. Accordingly, we do not decide whether this legally faultless killing amounts to such cause for removal as will promote the efficiency of the service. That is not our function.

II

Thus, having charted the appropriate bounds of our review by reference to time-honored guidelines, we turn to the questions for decision. We are first required to decide whether plaintiff's *removal* from the service on the basis of the charge and specification against him was in good faith or was arbitrary, capricious, or unsupported by substantial evidence.[7]

It will be recalled that the specification embodied in the letter of proposed removal delivered to plaintiff alleged that on May 9, 1965, he "brought discredit on the Internal Revenue Service by fatally shooting Miss Winifred O. McLaughlin." In order to overturn the adverse adjudication, plaintiff might therefore demonstrate that the agency did

[7] Plaintiff has not relied on violation of statutes or applicable procedural regulations.

not possess substantial evidence to support either or both of two findings: (1) that plaintiff fatally shot Miss McLaughlin, or (2) that plaintiff brought discredit upon the Internal Revenue Service.

At the time plaintiff was first notified of his removal, June 4, 1965, the evidence consisted of newspaper accounts and the investigative report. The agency must have considered such evidence, at least in part for the truth of the matter asserted therein, namely, that plaintiff fatally shot Miss McLaughlin. To this extent the evidence was entirely hearsay in the classic sense. Fed. R. Evidence 801(c). It cannot be denied, however, that hearsay can be substantial evidence to support an administrative adjudication. *McKee* v. *United States*, 205 Ct. Cl. 303, 500 F. 2d 525 (1974); *Jacobowitz* v. *United States*, 191 Ct. Cl. 444, 424 F. 2d 555 (1970); *Peters* v. *United States*, 187 Ct. Cl. 63, 70–71, 408 F. 2d 719, 722–23 (1969). The Supreme Court has approved this rule. *Richardson* v. *Perales*, 402 U.S. 389, 401–02 (1971).

The IRS was, therefore, confronted with the hearsay recitals of area newspapers and the investigative report of plaintiff's arrest. In view of the number of newspapers which carried the story we think that insofar as they reported the fact of a shooting, resulting in death observed by witnesses, they provided reliable and substantial evidence. The arrest itself, although as noted it did not form the basis of the removal action, provided further evidence of the fact of homicide. There was substantial, corroborated evidence, albeit hearsay, as of June 4, 1965, to support the conclusion of a reasonable mind and the administrative finding that plaintiff in fact shot his mistress to death. He did not then and does not now deny that the shooting took place.

We next inquire whether the evidence of record on June 4, 1965, was substantial evidence to support a finding that the shooting brought discredit on the Internal Revenue Service. We think it was. To this extent the newspaper articles were not hearsay, since the truth of their content has no bearing on the question of whether the agency was discredited. The mere existence of such accounts, including as they did pictures of plaintiff and his victim and headlines emphasizing his employment with IRS, was substantial evidence from which the agency, and ultimately the Civil Service Commis-

sion, were entitled in their discretion to conclude that plaintiff's conduct brought discredit upon his employer. Therefore, on both issues—the fact of the shooting and consequent discredit to IRS—the record exhibits substantial evidence. Reasonable minds could accept such evidence as adequate to support the stated conclusions at the time they were made. *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938); *Jacobowitz* v. *United States*, *supra*, 191 Ct. Cl. at 456, 424 F. 2d at 561.

The only other allegation of error germane to the removal which merits discussion is the implicit assertion that IRS acted arbitrarily, capriciously, or in a manner abusive of its discretion in peremptorily effecting plaintiff's removal before his indictment or trial in the Maryland courts. We have approved the administrative practice of deferring post-suspension action on proposed final removal from federal employment until the conclusion of criminal proceedings, particularly where the allegations giving rise to the prosecution also constitute the specifications in the adverse personnel action. *Peden* v. *United States*, 206 Ct. Cl. 329, 512 F. 2d 1099 (1975); *Cohen* v. *United States*, 177 Ct. Cl. 599, 369 F. 2d 976 (1966), *cert. denied*, 387 U.S. 917 (1967). But, we have never been of the opinion that such a course must invariably be followed in the good faith exercise of sound discretion or that our scope of review could require it. Where authorized officials find themselves possessed of substantial evidence tending to prove both the fatal shooting of another by an employee and consequent immediate discredit to the service through publicity of such conduct, all tending to impair public confidence in violation of the agency's Rules of Conduct (see note 3), without prejudice to other proper procedures, it is entirely permissible in the agency's discretion to effect prompt removal based upon such then-available substantial evidence of record. In *Holman* v. *United States*, *supra*, plaintiff was removed from his position in 1963 for an alleged immoral act for which he was acquitted in a criminal court in 1966. The court said that the acquittal did not require the conclusion that his separation from Government service was arbitrary. Plaintiff was also removed before acquittal in *Prater* v. *United States*, 172 Ct. Cl. 608 (1965). *Croghan* v. *United States*, *supra*, and in other cases. Compare the quote support-

ing expeditious action in *Arnett* v. *Kennedy*, note 6. Such action, of course, is subject always to the corresponding privilege of the aggrieved former employee to apply for reinstatement and to exhaust such rights of administrative appeal as are afforded by applicable statutes and regulations.[8] A similar procedure was followed in plaintiff's case. On final discretionary consideration by the Civil Service Commissioners, his case was reopened and remanded to the Appeals Examining Office for adjudication on the merits. In the circumstances, we are not prepared to say that the record shows excessively precipitous action which is arbitrary, capricious, or an abuse of agency discretion requiring our disapproval.[9]

Plaintiff, however, asserts that public image considerations are not a sufficient basis for discharging an employee who is without fault. But, fault may be in the eye of the beholder. The federal employee is on notice that he must maintain a good public image. Plaintiff was on notice of his agency's rules which provided for adverse action against an employee whose conduct might subject the agency to public criticism for keeping on the payroll a person under suspicion of murder or any other crime. IRS was especially sensitive because of its need to maintain public confidence in its image of integrity, depending as it does essentially on voluntary compliance of the public. *Hoorer* v. *United States*, 206 Ct. Cl. 640, 513 F. 2d 603 (1975); *Birnholz* v. *United States*, 199 Ct. Cl. 532, 537 (1972). It was the thrust of the testimony of plaintiff's supervisor that any scandal involving an IRS em-

[8] The propriety of this approach is confirmed by Section 14 of the Veterans Preference Act of 1944, now codified at 5 U.S.C. § 7512(b)(1) (1970):

"(b) A preference eligible employee against whom adverse action is proposed is entitled to—

"(1) at least 30 days' advance written notice, *except when there is reasonable cause to believe him guilty of a crime for which a sentence of imprisonment can be imposed*, stating any and all reasons, specifically and in detail, for the proposed action; * * *." [Emphasis supplied.]

See also 5 C.F.R. § 752.202(c)(2) (1975) to the same effect.

[9] Even if we entertained the view that the swiftness of the removal was error, which of course we do not, such error would be harmless. To sustain a recovery based upon administrative impropriety a plaintiff must demonstrate the manner in which he has been prejudiced thereby. *Hart* v. *United States*, 204 Ct. Cl. 925, 498 F. 2d 1405, *cert. denied*, 419 U.S. 1049 (1974); *Haynes* v. *United States*, 190 Ct. Cl. 9, 418 F. 2d 1380 (1969); *Cohen* v. *United States*, 177 Ct. Cl. 599, 369 F. 2d 976 (1966), *cert. denied*, 387 U.S. 917 (1967). Plaintiff lost no additional salary because of removal, for he had already been suspended without pay. Moreover, plaintiff did ultimately secure review on the merits before the Civil Service Commission.

ployee impaired the integrity of the office. Like Caesar's wife, IRS employees are supposed to be above suspicion. In its discretion that agency is entitled to act with promptness in maintaining the efficiency of the service by such disciplinary actions as will maintain public confidence. This concept is explicit in the Foreword (by the Commissioner of Internal Revenue) to the Rules of Conduct for Internal Revenue Service Employees (Rev. 10–63), which states in part:

> * * * We can maintain public confidence only to the extent that every one of our contacts with the public reflects the highest ethical and moral standards.
>
> In addition to our daily assigned tasks, each of us has an important public relations role to play. Not only must we act with complete propriety, but we must be sure that none of our actions can be interpreted otherwise. * * *.

Section 1941.4 of the Rules has heretofore been quoted in footnote 3 and was included in the charge against plaintiff by his agency. It, too, emphasizes the importance of maintaining public confidence in the agency through conduct which will bring credit, not discredit, upon the Internal Revenue Service, with removal from employment a possible sanction for failure to behave both outside and during working hours in a manner above reproach. Additionally, 5 C.F.R. § 735.209 (1975) provides:

> An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

Surely plaintiff's conduct, however legally faultless, could in the agency's discretion be found to have run afoul of these admonitions against bad public relations and notoriously disgraceful conduct prejudicial to the Government and falling short of the highest moral standards. It would be a curious thing indeed if just because a state's attorney declined to prosecute a homicide the IRS would be deprived of its right and duty to enforce its own published rules and regulations for employee conduct. It would be more curious still if, indulging in the luxury of hindsight and speculation, this court should enforce such a result by concluding that had the IRS known that the state's attorney would not press the indictment and that the court would acquit plaintiff on in-

sanity grounds, that the IRS would not have enforced its rules which implicitly mandate speedy action to accomplish their plainly stated purposes which are altogether unrelated to the merits of a criminal charge or defense thereto. *Croghan* v. *United States*, *supra*, 116 Ct. Cl. at 586, 89 F. Supp. at 1004. Further, to argue that the better practice would have been for IRS to have withheld action on the removal until the criminal case was concluded does not give the court authority to so require it in the face of rules, regulations, and statutes which seem to contemplate otherwise and where the agency's discretion is not shown to have been abused or based on insubstantial evidence in applying those restrictions.

III

Next we consider whether the refusal of IRS to reinstate plaintiff upon his return and after acquittal by reason of insanity is legally wanting. Once again we do not decide the merits of the agency's decision to decline reemployment. In cases such as this whether plaintiff should be employed by the Government is no concern of the judicial department.

Our attention has been directed to FEDERAL PERSONNEL MANUAL, Chapter 306, Subchapter 5–2 (1969), where it is said:

> As a general rule, a history of mental illness is not disqualifying for Federal employment provided that recovery has been certified by competent medical authority and the applicants are capable of performing the duties of the position without hazard to themselves or others * * *.

Thus, prior mental illness bars neither initial employment with the Government nor reinstatement, so long as the impediment to health has been removed. That is not to say by any means, however, that a victim of prior mental illness *must* be restored to duty. We have held time and again that acquittal of a criminal charge does not erect a bar to adverse action in respect of one's federal employment. *Holman* v. *United States*, *supra*; *Prater* v. *United States*, *supra*; *Finn* v. *United States*, *supra*; *Bryant* v. *United States*, 122 Ct. Cl. 460 (1952), *cert. denied*, 344 U.S. 913 (1953); *Croghan* v. *United States*, *supra*. By analogy, acquittal of a criminal

charge based upon a plea of legal insanity does not bar the employing agency from denying reinstatement, where such denial violates no statute or regulation and is neither arbitrary, capricious, nor an abuse of discretion.[10]

On the record before us we cannot say that the agency erroneously rejected plaintiff's bid for his former job. Having initially removed him in a legally proper manner in view of what it in good faith judged to be such cause as would promote the efficiency of the service, the agency acted within permissible limits in requiring plaintiff to pursue the matter of his removal before the Civil Service Commission. IRS apparently took the position that if in view of new evidence the removal fell, so too would its decision not to reinstate. We are unable to perceive the slightest impropriety in such a procedure. On the contrary—we think it to have been eminently fair. The extensive administrative record has been supplemented by a 3-day trial in court, by detailed findings, and close attention by the trial judge and this appellate panel to the procedures followed in plaintiff's removal.

IV

Plaintiff's removal from office was based upon substantial evidence and was neither arbitrary nor capricious. We find no legal fault with the decision of IRS and CSC not to reinstate him. Accordingly, the plaintiff is not entitled to recover.

The core of plaintiff's case is his belief that it is unjust to deprive a man of his job who was not responsible for the act giving rise to the removal and that there is no nexus between his offense and removal. In keeping with settled principles of law we have declined to base this opinion on the debatable question of whether this killing, faultless in legal contemplation, may be deemed such cause for removal

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[10] *See* 5 U.S.C. § 3315 (1970):

"(a) A preference eligible who has been separated or furloughed without delinquency or misconduct, on request, is entitled to have his name placed on appropriate registers and employment lists for every position for which his qualifications have been established, * * *.

"(b) The Commission *may* declare a preference eligible who has been separated or furloughed without pay under section 7512 of this title to be entitled to the benefits of subsection (a) of this section." [Emphasis supplied.]

as promotes the efficiency of the service. "It is not within the jurisdiction of the court to inquire into the guilt or innocence of the plaintiff as to the charges upon which he was removed from office." *Golding* v. *United States*, 78 Ct. Cl. 682, 685, *cert. denied*, 292 U.S. 643 (1934). The wisdom of such a long-standing judicial position is evident, although on the facts of this case it would not be difficult to reach such a tempting conclusion. But, to assume jurisdiction to second-guess the administrators on what is best for efficiency of the service treads on dangerous ground. Such perplexing questions are better resolved at the administrative level, according to the tenor of our prior decisions respecting the separation of powers. It is the unquestioned right of the executive to select employees in that department. Further, as held by the Supreme Court in an opinion by Mr. Chief Justice Taft in the landmark case of *Myers* v. *United States*, 272 U.S. 52 (1926), the power of removal is incident to the power of appointment. *See also Burnap* v. *United States*, 252 U.S. 512 (1920); *Keim* v. *United States*, 177 U.S. 290 (1900); *Radford* v. *United States*, 264 F. 2d 709, 710 (5th Cir. 1959); *Morelli* v. *United States*, 177 Ct. Cl. 848, 858 (1966). The appropriate penalty to impose upon an employee for infraction of an agency's rules is within the discretion of the agency subject to review on the merits by the Civil Service Commission, as in this case, and subject to judicial review on a more limited basis for procedural regularity and abuse of administrative discretion and bad faith. *Hoover* v. *United States*, *supra; Grover* v. *United States*, 200 Ct. Cl. 337, 353 (1973); *Liotta* v. *United States*, 174 Ct. Cl. 91, 96 (1966); *De Nigris* v. *United States*, 169 Ct. Cl. 619, 625 (1965). We decline the invitation in this case to abandon long-established precedents and make bad law. The petition must be dismissed.

It is so ordered.

LARAMORE, *Senior Judge*, dissenting:

The facts of this case are concededly grotesque. As the majority views the unhappy events:

> On Mother's Day, Sunday, May 9, 1965, * * * plaintiff and Miss McLaughlin set out by car * * *. [F]or unknown reasons an altercation took place between them. They left the car, whereupon plaintiff seized a 4-barreled Derringer and killed her with two shots as she sought to flee * * *.

Plaintiff, a veterans' preference eligible, was at this time employed by the Internal Revenue Service. Charged with murder, he was found by a Maryland state court to have been not guilty by reason of insanity. Since that time, however, a jury in a later proceeding found that plaintiff had regained his sanity. He now seeks reinstatement to his former position with back pay.

The majority goes to great pains to demonstrate that this is a case easily decided. But my brothers rely upon the emotional appeal of the facts and a conception of judicial review of administrative action—which, in my judgment, no longer prevails—to cloak this court's responsibility to dispassionately resolve the issues.

While in this case a potentially unpopular result renders this responsibility onerous, I must accept the burden and respectfully dissent.

I

Primarily, I cannot accept the standard of review which is being adopted today in the opinion of the majority. At one point my brothers quote part of a paragraph from *Schlegel* v. *United States*, 189 Ct. Cl. 30, 40, 416 F. 2d 1372, 1378 (1969), *cert. denied*, 397 U.S. 1039 (1970), for the proposition that this court has *no* role to play in determining whether or not there is a sufficient nexus between the removal action under review and the efficiency of the service. Recitation of the full passage is necessary to demonstrate their mistaken reliance on the language quoted out of context (emphasis supplied to the portion omitted by the majority):

> Whether a person's discharge will promote the efficiency of the service is an administrative decision to be determined within the discretion of the agency, and no court has power to review the action, if taken in good faith. *Brownell* v. *United States*, 164 Ct. Cl. 406, 408–409 (1964); *Gadsden* v. *United States*, 111 Ct. Cl. 487, 489, 78 F. Supp. 126 (1948). *At the trial of the instant case before Commissioner Stone, three of plaintiff's superiors offered testimony indicating that the morale and efficiency of the office would have been affected by plaintiff's*

continued presence. This testimony, when coupled with the administrative determinations concerning efficiency of the service, constitutes convincing proof that plaintiff's removal promoted the efficiency of the service and eliminated plaintiff's detrimental influence on the efficiency of the service.

Several observations concerning *Schlegel* are in order. First, as the emphasized language cited above makes clear, this court affirmatively agreed with the determination of the Civil Service Commission and blind reliance upon agency expertise was not utilized in that case. Before affirming the agency's decision, we satisfied ourselves that the removal promoted the efficiency of the service. Second, *Schlegel* expressly distinguished the facts of *Norton* v. *Macy*, 417 F. 2d 1161 (D.C. Cir. 1969). My reading of *Schlegel* leaves me perplexed as to the basis for the implicit conclusion by the court in the instant case that *Schlegel* disapproved the standard of review used in *Norton*. To the extent any disagreement may have been expressed in *Schlegel*, it concerned the substantive merits of the disputed discharge, rather than the standard of review. *Schlegel*, *supra*, 189 Ct. Cl. at 40–41, 416 F. 2d at 1378.

It is true that at one time the prevailing view was to rely exclusively upon the expertise of administrative agencies for correct application of specialized statutes. *See*, *e.g.*, *Gray* v. *Powell*, 314 U.S. 402 (1941). However, the advent of the Administrative Procedures Act[1] in 1946 precipitated an eventual shift in emphasis so that courts now have a responsibility to review even discretionary administrative action. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *Ciambelli* v. *United States*, 198 Ct. Cl. 240 (1972). Acknowledging this, the majority, in this case, adopts "good faith" as its standard of review. And at certain points in its opinion the court appears to define a "good faith determination" in a manner which would preclude arbitrary and capricious action, a determination unsupported by substantial evidence or an action contrary to law. Yet, my brothers allude to those terms without any real attempt to apply their meaning. While the scope of review under these standards may

[1] Act of June 11, 1946, 60 Stat. 237, as amended, 5 U.S.C. §§ 551, *et seq.*, and 701, *et seq.*

indeed be narrow, this court has an important responsibility to determine whether a particular case falls within the narrow category of cases where it must determine that legal error has been committed.

The Supreme Court of the United States in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974), has recently laid down the rule that, as a reviewing court, we must determine the legal framework within which administrative discretion is exercised:

> Under the "arbitrary and capricious" standard the scope of review is a narrow one. A reviewing court must "*consider whether the decision was based on a consideration of the relevant factors* and whether there has been a clear error of judgment * * *. Although this *inquiry into the facts is to be searching and careful*, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe*, *supra* at 416. *The agency must articulate a "rational connection between the facts found and the choice made. Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962) * * *. [Emphasis supplied.]

Bowman states what I believe in this case to be the proper scope of our responsibility of review.

II

I consider now the action taken by the agency which is at issue and additional reasons which compel me to voice my disapproval of the court's review. The court devotes substantially all of its discussion to the removal action by the Internal Revenue Service (IRS) on June 4, 1965, and the evidence adduced by the IRS at that time. Only one meager statement in the majority's opinion reveals that plaintiff's case was, in fact, reopened by the Civil Service Commission and remanded to their Appeals Examining Office (AEO) for a *new adjudication on the merits*. The reopening of the case for a decision on the merits, in my view, spares this court the necessity of having to decide whether the removal action taken by the IRS was improper. Instead, the action I would regard as coming under review is the notice of April 4, 1968, by the Chief of the AEO (affirmed by the full Board, by letter, on June 28, 1968), in which the plaintiff's removal was sustained.

Since the Civil Service Commission's decision of April 4 should have been the agency action primarily reviewed by this court, this court's review should have taken into account all of the evidence available to the Civil Service Commission at the time of his final action, and not merely the evidence adduced at the time of removal by the IRS. Moreover, in considering the issue of arbitrariness, the court may review all available evidence, including *de novo* evidence taken before one of our trial judges, as well as the administrative record. *Schlegel* v. *United States*, *supra; Brown* v. *United States*, 184 Ct. Cl. 501, 396 F. 2d 989 (1968).

It is beyond question that there has been at least a minimal showing, upon the record, that plaintiff's mental condition was impaired at the time he committed the act for which he was removed. The decision of the AEO on April 4 impliedly refers to this in stating that plaintiff's conduct was inconsistent with the proper standard of conduct for employees "regardless of their state of mind." Thus, plaintiff's state of mind was a factor taken into account by the AEO in passing upon the legal merits of plaintiff's discharge. In light of this, the decision of the AEO enunciates what, in my view, is an erroneous construction of the laws applicable to the facts of this case.

With respect to the legal merits, the April 4 decision stated, in pertinent part:

> * * * The fact of the matter is that an Internal Revenue Agent has killed a human being, and has only escaped punishment by virtue of a plea of insanity. *It is a simple conclusion of fact that the unjustified killing of a human being is inconsistent with the standard of conduct for employees in the Federal Service regardless of the state of their mind at the time the killing was committed.* Therefore, we find the appellant's removal was for a cause which promoted the efficiency of the service. [Emphasis supplied.]

And yet, both the IRS and the Civil Service Commission accept the view that mental illness is not a cause for removal or denial of reinstatement if the employee has recovered. The Civil Service Commission policy, set forth in Federal Personnel Manual, chapter 306, 5–2 (1969), is that, "as a general rule, a history of mental illness is not disqualifying for Federal employment provided that recovery has been certified by competent medical authority and the applicants are capable of performing the duties of the position without hazard to themselves or others * * *." Thus, subchapter 5–2 provides for initial employment and for reinstatement if the employee has previously been dismissed for reasons attributable to mental illness. *See Manzi* v. *United States*, 198 Ct. Cl. 489, 493–494 (1972). I think it odd that while cured mental illness is not disqualifying for Federal employment that an employee could still be subject to a disciplinary dismissal for conduct resulting from such an illness.[2]

Plaintiff is entitled to the benefits of the Veterans' Preference Act of 1944, 5 U.S.C. §§ 3315, 7512, 7701, which was designed to confer a measure of additional job security on veterans not enjoyed by unprotected Federal employees. Insofar as Congress provided therein that an employee having such status may be dismissed "only for such cause as will promote the efficiency of the service," it plainly meant that "the employer agency must demonstrate some 'rational basis' for its conclusion that a discharge 'will promote the efficiency of the service.'" *Norton* v. *Macy*, *supra* at 1164. I believe it is not reasonable nor rational to construe the Rules of Conduct of IRS Employees to threaten sanctions for anything less than volitional or conscious behavior because there is no real deterrent purpose that can be served in a disciplinary removal when all the evidence points to lack of moral culpability. *Cf. Morissette* v. *United States*, 342 U.S. 246 (1952). The Civil Service Commission's action in this case thus smacks of emotionalism rather than reasoned decision making.

Moreover, I do not believe, as the majority implies, that in enacting the Veterans' Preference Act of 1944, Congress intended to permit an agency to achieve the purpose of acquiring or maintaining a good public image at the price of dismissing veterans as disciplinary measures for conduct for which they may have been wholly without legal fault. I cannot, in good conscience, join the court today in holding that

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[2] There is no doubt that the charge upon which plaintiff's dismissal was based was a disciplinary one because it was based purely on plaintiff's past conduct and not his inability to perform in the future.

"fault may be in the eye of the beholder," for to do so would be taking away a good measure of the job protection that Congress sought to provide for veterans who have honorably served the country in and out of military uniform.

In summary, my view is that the Commission was under a clear legal misapprehension when it refused to consider the plaintiff's state of mind as bearing upon his legal and moral culpability. However, there is no need to remand this case to the Civil Service Commission because no exceptions were taken by either party to the factual findings of Trial Judge Miller, and the case is now one purely of applying the law to the findings. Two pivotal findings read as follows:

> 41. On May 8, 1965, at the time when plaintiff killed Miss Winifred O. McLaughlin, plaintiff was of such mental incapacity and reason so as not to be able to properly distinguish between right and wrong, nor to know the nature and consequences of his acts as applied to himself, and was not responsible for his actions.
>
> 42. On April 6, 1966, when plaintiff applied to IRS for reinstatement to the position from which he had been removed, and at all relevant times thereafter plaintiff was recovered from his mental illness, was of sound mind, did not represent a threat to the safety or property of others, and was fully able to perform the duties of such position.

On this basis, I would find that the Civil Service Commission could not properly find that legal "cause" existed for plaintiff's removal for violating the Rules of Conduct of IRS Employees.[3]

However, with respect to the question of reinstatement, I concur with the majority because, under the jurisdictional act of this court, restoration is discretionary.

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[3] This proceeding involves questions of exceptional importance and difficulty, and since the opinion of the court, in my judgment, seems to depart from prior decisions with respect to the question of our scope of review, this case appears to be an appropriate candidate for rehearing en banc pursuant to Rule 7 (b) or (d).

APPENDIX C

IN THE
UNITED STATES COURT OF CLAIMS

No. 249-69

SAMUEL C. WATHEN, JR.

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, LARAMORE, *Senior Judge*, and BENNETT, *Judge*.

ORDER

This case comes before the court on plaintiff's motion, filed January 5, 1976, for rehearing *en banc* and motion for rehearing to reconsider judgment pursuant to Rules 7 (d) and 151(b). Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied*, and further having been so considered by

the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied**.

BY THE COURT

January 30, 1976

/s/ WATSON COWAN
Watson Cowan
Chief Judge

* DAVIS, *Judge*, dissents in that he would allow plaintiff's suggestion for rehearing *en banc* under Rule 7(d).

** LARAMORE, *Senior Judge*, dissents in that he would allow plaintiff's motion for rehearing to reconsider judgment under Rule 151(b).

NICHOLS, *Judge*, concurs in the result as follows:

Since I do not agree with statements in the majority opinion, yet have decided to vote against rehearing because I do agree with the result, I respectfully submit this statement of my views.

The Maryland court proceedings dealing with Mr. Wathen, as reported in the majority opinion, seem at first blush to furnish a prime example of the reasons why people are losing faith in our system of criminal justice, and must eventually subject it to sweeping reforms. However, the careful opinion and findings of Trial Judge Philip R. Miller, afford no basis to impugn the good faith of anyone concerned, or the legal correctness of the Maryland judicial rulings, or the professional competence of the psychiatrists who achieved, according to themselves, such an apparently miraculous cure. If defendant had offered evidence on these points we might have had a difference case. There are limits to *res judicata* and collateral estoppel in cases, *e.g.*, of fraud on the court, but such issues do not confront us here. Though we are a society that recoils in horror against taking of life by the state, we treat such taking by anyone else as a very minor peccadillo. The fact remains, plaintiff has blood on his hands, and all the absolution the psychiatrists can offer will not suffice to wash it off.

The panel attacks its case the hard way by raising the vexed, but here I think moot, issue as to whether, or to what extent, an administrative decision that a removal will promote the efficiency of the service, is subject to judicial review. At one time I took issue with *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969), which innovated such review, believing it to be a judicial intrusion into an area reserved for executive discretion when it is a matter, at least, of deciding what kinds of behavior are detrimental

to service interests. I am gratified to see others coming to my opinion, but I am no longer so sure of it myself. It is anomalous to have a single separate area of decision-making excluded from judicial review when such exclusion is not based on express statutory provisions, absent here. When Congress desires to preclude judicial review it knows how to do it. *Chambers v. United States*, 196 Ct. Cl. 186, 451 F.2d 1045 (1971). However, judges must be careful not to presume automatically that their wisdom is superior. Running executive agencies is difficult enough even for those appointed to do so and in daily contact with the problems. Identification of service interests and weighing priorities with respect thereto are matters of high executive discretion. Where *Norton v. Macy* went wrong was in giving insufficient respect to the agency's ideas as to what was needed to maintain its efficiency, not in venturing on forbidden territory. Yet, particularly in the area of alleged off-duty misconduct, there can easily be, and in the past, have been, abuses of executive discretion in unreasonable efforts to regulate the off-duty behavior of Government employees.

In *Schlegel v. United States*, 189 Ct. Cl. 30, 416 F.2d 1372 (1969), *cert. denied*, 397 U.S. 1039 (1970), the court majority seemed to me to have it both ways, reviewing favorably the administrative determination of what was good for the service, while asserting it was immune from such review. It attempted to distinguish *Norton v. Macy* on the facts instead of disapproving it as I would have done. The panel majority here may be right as to the almost irrefragable proof required to overturn the executive decision, if you limit it to on-duty misconduct, yet be wrong as to off-duty misconduct.

The issue is moot, for me, in Wathen's case, because it is for me too plain for argument that it is not good for

the Internal Revenue Service's efficiency to employ an agent with Mr. Wathen's history, *i.e.*, one who has taken life – even if only once – in a fit of dissociation when faced with apparently insurmountable stress and emotional trauma, has avoided (in the lawyer's dichotomy, I do not say evaded) the law's penalty for murder on the ground of insanity, and has won release shortly thereafter on the ground of being perfectly sane. Such people have their qualities, and there must be a niche for them somewhere, but surely not in the IRS! I cannot help asking how a taxpayer would like having Mr. Wathen call on him to audit his tax returns. Would he eye him for a suspicious bulge, or ask him to undergo a pat-down search? The dissent in this case is not written out of perfect faith in the psychiatrist's one in ten thousand estimate of the chances of a relapse, at the dissent's caveat against ordering reinstatement shows. But if Wathen should not be reinstated in 1976, how can the agency be faulted for not doing so in 1966?

The real question is whether the offense violated any regulation of the IRS. "Conduct to discredit" is a concept derived from military law. We know from *Parker v. Levy*, 417 U.S. 733 (1974), that it adequately describes a host of off-duty offenses. Testimony that the behavior actually lowered public esteem for the agency, or did not, should not be required in every case. We know by the Maryland court decisions what Wathen was not guilty of murder. Our trial judge analyses the holdings as indicating a lack of *mens rea* because of Wathen's temporary psychiatric condition, and he would read a *mens rea* requirement into the IRS regulation too. It is not correct to say that Wathen was exonerated of all legal fault. I do not think *mens rea* is required for a civil action for wrongful death. The Maryland courts did not have this issue before them. One could well suppose, and I do suppose, that Wathen

may be or have been liable to the heirs or next of kin of his victim, Miss McLaughlin. The way the agency testified, and the way it framed its charges, it is clear it considered that homicide without *mens rea* was conduct to discredit. They would not properly apply it, of course, to a purely accidental homicide, free of all fault, but that is not this case, nor is a homicide in self-defense. It seems to me a perfectly rational application of the prohibition against conduct to discredit, to apply it to all homicides except those where the employee is or should be exonerated of legal fault, noting the difference between being without fault and without *mens rea*. In this case, so far as we know, he has never been exonerated of anything except the charge of murder, and he was exonerated of that on grounds, lack of *mens rea*, that would have no impact on civil liability.

By my analysis, therefore, the plaintiff is not aided by his acquittal and it may be moot whether the agency's case should be evaluated as it was when the plaintiff was dismissed, or as of the final stage of administrative review, as the dissent urges. As to this, if we must decide it, I agree with the dissent. We held in *Peden v. United States*, 206 Ct. Cl. 329, 512 F.2d 1355 (1975) that the agency could use as part of its "substantial evidence" at the hearing, newly discovered or newly available incriminating testimony the agency did not have when it terminated the plaintiff's employment. It would seem to follow he should have a right to use new evidence or new developments that favored his case, until administrative finality is reached and perhaps even after.

The agency that has a choice of misconduct charges, or involuntary retirement for psychiatric disability, nearly always opts for the former, and with good reason. A proposal along the latter line precipitates an embittered

and costly struggle, which should be avoided when possible, in the interests of both sides. Most people can live easier with the idea they have committed misconduct than that they are psychiatrically disabled, even when, in a pecuniary sense, the latter option would be preferable for them. Nor do they care to have their psyches examined by Government psychiatrists, not of their own choice. For this reason it appears to me that agency codes of conduct, and tables of penalties for misconduct, should generally be read as applicable to the prohibited conduct whether or not committed with *mens rea*. The concept of *mens rea* should be confined to the criminal law, where it originated and where it belongs. Agencies confronted with irrational and self-defeating behavior on the job should not be judicially required to consider *sua sponte* whether it is due to psychiatric disability. If the offending employee sets up psychiatric disability and offers to accept disability retirement in lieu of discharge, he should receive every consideration, and so far as I am aware, he usually does.

It seems to me that the very idea of disability in the Civil Service context, means inability to meet the physical or psychic requirements of the particular job, whatever they are. Should the agency have determined that plaintiff's history made him unsuitable for re-employment, it could not consistently have refused him a disability retirement, in my judgment. This conclusion obtains even if the agency determined that plaintiff committed the offense stated in the charging letter, since the offense, as stated by it, was committed whether or not plaintiff was psychiatrically disabled. In short, the disability retirement, with annuity, appears to me to be the solution the Civil Service laws prescribe for instances where the employee has violated an agency regulation, but excusably because of his psychiatric condition. The extreme remedy of forcing him back to active duty is one the courts should shun when-

ever possible, as it assuredly will not make for the efficiency of the service. This is not to say that in this case, at this time, a disability retirement is still a possible solution.

Among the members of our own bench, and I expect with others, the outcome one way of the other is seemingly viewed as morally wrong and leading to obnoxious consequences. The case is a polarizing one. My object in writing has been to point out that, even given the bizarre circumstances of this case, extreme positions were not, antecedently considered, necessary, and a reasonable intermediate solution was, antecedently considered, possible under existing law.

Supreme Court, U. S.
FILED
JUL 1 1976
MICHAEL RODAK, JR., CLERK

No. 75-1588

In the Supreme Court of the United States

OCTOBER TERM, 1975

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 57a-78a) is reported at 527 F.2d 1191.

JURISDICTION

The judgment of the Court of Claims was entered on December 17, 1975, and a petition for rehearing was denied on January 30, 1976 (Pet. App. 79a-86a). The petition for a writ of certiorari was filed on April 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATUTE AND REGULATIONS INVOLVED

The Veterans Preference Act of 1944 provides in pertinent part that (5 U.S.C. 7512(a)):

> An agency may take adverse action against a preference eligible employee, or debar him for future employment, only for such cause as will promote the efficiency of the service.

5 C.F.R. 735.209 provides that:

> An employee [of the Internal Revenue Service] shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

Section 1941.4(1) of the Rules of Conduct for Internal Revenue Service Employees (revised October, 1963) provides:

> The effectiveness of the Revenue Service in serving the public interest depends upon the extent to which the Service and its employees hold the confidence and esteem of the Nation's citizens. This means that each employee must do his part to maintain this confidence and esteem by performing his work conscientiously, courteously, and in the most effective manner possible; by conducting himself during and outside working hours in a manner which will bring credit upon the Service; and by observing the spirit, as well as the letter, of the laws and regulations, and Revenue Service and Treasury Department requirements governing employee conduct. Employees whose conduct does not conform to the rules may be removed from the Service or may be the subject of other disciplinary action.

QUESTION PRESENTED

Whether the Court of Claims, in this case involving the discharge of a federal employee, applied the correct standard of review.

STATEMENT

On May 9, 1965, petitioner, then an agent of the Internal Revenue Service entitled to veteran's preference, fatally shot a woman; he was arrested, charged with murder, and held in custody without bond pending trial (Pet. App. 58a). On May 14, 1965, petitioner was informed by the Internal Revenue Service that it proposed to remove him from the Service in not less than thirty days for violating Section 1941.4 of the Rules of Conduct for Internal Revenue Service Employees, by "conduct[ing] [himself] in a manner which brought discredit upon the Internal Revenue Service by fatally shooting Miss Winifred O. McLaughlin" (Pet. App. 59a, n. 3). Petitioner did not contest the proposal, and the removal became effective June 18, 1965 (Pet. App. 60a).

Subsequently, a state court found petitioner not guilty of homicide by reason of insanity, and committed him to a state mental hospital. On March 29, 1966, petitioner was released from custody upon a jury finding that he then was sane (Pet. App. 60a-61a).

Petitioner thereafter requested that he be reinstated to his former job with the Internal Revenue Service; the Service denied his request. Petitioner then appealed his removal and the denial of reinstatement to the Civil Service Commission. After considering the records of petitioner's criminal trial and sanity hearing and various newspaper reports concerning the fatal shooting, the Chief of the Appeals Examining Office of the Civil Service Commission sustained the removal and denial of reinstatement, reasoning that (Pet. App. 12a):

* * * The removal action against the appellant is based upon the fact that he did kill a human being and this act of killing violates standards of conduct required for retention on the rolls of the Internal Revenue Service.

* * * * *

As noted hereinbefore, there is no allegation in the record that the killing of this human being was done pursuant to authority of law or in self defense. In no sense then can it be a justifiable homicide as attorney for the appellant states. The situation requires no long discussion. The fact of the matter is that an Internal Revenue Agent has killed a human being, and has only escaped punishment by virtue of a plea of insanity. It is a simple conclusion of fact that the unjustified killing of a human being is inconsistent with the standards of conduct for employees in the Federal Service regardless of the state of their mind at the time the killing was committed. Therefore, we find the appellant's removal was for a cause which promotes the efficiency of the service. [Emphasis omitted.]

The Board of Appeals and Review affirmed (Pet. App. 62a).

Petitioner then commenced this action in the Court of Claims, alleging that his removal violated the Veterans Preference Act, 5 U.S.C. 7512(a), because it was not for a cause that "promote[d] the efficiency of the service," and seeking backpay and reinstatement. The Trial Judge ruled that petitioner's removal had been improper because petitioner's conduct had been found to be "wholly without fault" (Pet. App. 27a). The Court of Claims reversed (Pet. App. 57a-78a). The court determined that the

decision to remove petitioner was made in good faith and was not arbitrary, capricious, or unsupported by substantial evidence (Pet. App. 65a-70a). The court found that there was substantial evidence to support the findings that petitioner had committed the fatal shooting in a manner that brought discredit upon the Internal Revenue Service, within the meaning of the Rules of Conduct for Internal Revenue Service Employees and 5 C.F.R. 735.209, and that he derogated from the efficiency of the Service, within the meaning of the Veterans Preference Act (Pet. App. 65a-70a).

ARGUMENT

Petitioner contends that the Court of Claims applied an improper and unduly restrictive standard of review to the administrative determinations upholding his removal. Petitioner relies primarily upon *Bowman Transportation* v. *Arkansas-Best Freight System*, 419 U.S. 281, and *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168, for the proposition that the reviewing court must at least discern a rational basis for such administrative determinations, and he asserts that the Court of Claims here failed to do so.

As indicated above, however, the Court of Claims carefully scrutinized the administrative record in determining that there was substantial evidence to support the findings that petitioner had committed the fatal shooting and thereby discredited the Internal Revenue Service. Although the court properly declined to substitute its judgment for that of the Internal Revenue Service in deciding whether a "faultless killing amounts to such cause for removal as will promote the efficiency of the service" (Pet. App. 65a), the court did examine whether there was a rational basis for such a decision (Pet. App. 68a-69a):

Plaintiff * * * asserts that public image considerations are not a sufficient basis for discharging an employee who is without fault. But * * * IRS was especially sensitive because of its need to maintain public confidence in its image of integrity, depending as it does essentially on voluntary compliance of the public. * * * It was the thrust of the testimony of plaintiff's supervisor that any scandal involving an IRS employee impaired the integrity of the office. * * *

* * * * *

Surely plaintiff's conduct, however legally faultless, could in the agency's discretion be found to have run afoul of these admonitions [in the Rules of Conduct for Internal Revenue Service Employees and in 5 C.F.R. 735.209] against bad public relations and notoriously disgraceful conduct prejudicial to the Government and falling short of the highest moral standards.

Accordingly, the standard of review employed by the Court of Claims here is consistent both with that employed by other lower federal courts that have reviewed such administrative determinations and with the holdings of this Court.[1]

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[1]Petitioner relies upon two decisions of the District of Columbia Circuit that require that agencies show a "reasonably foreseeable, specific connection" between the alleged conduct and the "efficiency of the service" with regard to discharges based upon allegations of homosexual behavior (*Norton* v. *Macy*, 417 F.2d 1161, 1167; *Scott* v. *Macy*, 349 F.2d 182, 185). Petitioner, however, has not cited any precedent for the proposition that an agency is required to make such a detailed showing when a discharge action is based upon the taking of human life, and we know of none. The unjustified fatal shooting of another human being reasonably can be presumed to cast grave doubt on the employee's reliability, trustworthiness, and ethical conduct, all of which affect the efficiency of the service. See *Embrey* v. *Hampton*, 470 F.2d 146 (C.A. 4); *Rodriguez* v. *Seamans*, 463 F.2d 837 (C.A.D.C.), certiorari dismissed, 409 U.S. 1094. See also *Polcover* v. *Secretary of Treasury*, 477 F.2d 1223, 1231-1232 (C.A.D.C.); *Finfer* v. *Caplin*, 344 F.2d 38, 41 (C.A. 2), certiorari denied, 382 U.S. 883; *Taffel* v. *Hampton*, 463 F.2d 251 (C.A. 5).

To the extent that, as petitioner claims (Pet. 19-20), there is any inconsistency among the decisions of the Court of Claims on this issue, the resolution of such an intra-court conflict is a matter appropriately left to that court.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1976.